



(27,778)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 421.

ALEXANDER KAHN, DONALD FISHER, ROBERT L. LE  
COQ, ET AL., APPELLANTS,

v.s.

AUGUST V. ANDERSON, WARDEN OF THE UNITED  
STATES PENITENTIARY AT LEAVENWORTH, KAN-  
SAS.

*Appeal from*

~~IN THE~~ THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF KANSAS.

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1 In the District Court of the United States for the District of Kansas.

No. 2081.

In the Matter of the Application of ALEXANDER KAHN, DONALD Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson, and Millard Bowers, for a Writ of Habeas Corpus.

*Citation.*

UNITED STATES OF AMERICA, *et al.*:

August V. Anderson, Warden, United States Penitentiary at Leavenworth, Kansas:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America to be holden at Washington, thirty (30) days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's office, for the District Court of the United States, For the District of Kansas, wherein Alexander Kahn, Donald Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson and Millard Bowers, are appellants and you are appellee, to show cause, if any there be why the judgment and decree rendered against the said appellants, as — the said appeal mentioned should not be corrected and why speedy justice should not be done in that behalf.

Witness the Honorable J. C. Pollock, Judge of the United States Court for the District of Kansas, this 11th day of June, in the year of Our Lord, Nineteen Hundred and Twenty.

JOHN C. POLLOCK,  
*District Judge.*

UNITED STATES OF AMERICA,  
*District of Kansas, ss:*

Due service of the within citation is hereby acknowledged this 11 day of June, 1920.

FRED ROBERTSON,  
*United States District Attorney and  
Solicitor for Appellee.*

1½ [Endorsed:] No. 2081. In the Matter of the Application of Alexander Kahn, Donald Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson, and Millard Bowers, for a Writ of Habeas Corpus. Filed June 11, 1920. F. L. Campbell, Clerk, by C. B. White, Dep. Clrk.

2 In the District Court of the United States for the District of Kansas.

In the Matter of the Application of ALEXANDER KAHN, DONALD Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson, and Millard Bowers, for a Writ of Habeas Corpus.

*Petition.*

STATE OF KANSAS,

County of Leavenworth, as:

The petitioners, Alexander Kahn, Donald Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson, and Millard Bowers, state that they are unjustly and unlawfully detained and imprisoned at the United States Penitentiary at Leavenworth, Kansas, by the Warden of said Penitentiary, A. V. Anderson, Esq., upon a charge and conviction of murder, which said charge is in words and figures as follows:

(Charge Sheet.)

United States Disciplinary Barracks.

Fort Leavenworth, Kansas.

August 31, 1918.

General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Orville Haskell, Registered No. 2208; Tony Feo, Registered No. 12496; Robert R. Le Coq, Registered No. 12668; Donald Fisher, Registered No. 12667; Archibald N. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Schieman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; Archie Writtenberry, alias Archie Whittenberry, Registered No. 13252; William F. Peters, Registered No. 13231; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534;

Witnesses, (See attached synopsis.)

Charge I: Violation of the 96th Article of War.

Specification: In that General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Robert R. Le Coq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald N. Hawes, Registered No. 12945; William Schieman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No.

3      13130; Archie Writtenberry, alias Archie Whittenberry, Registered No. 13252; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered Number 13534, did at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, on or about the 27th, 28th and 29th days of July, 1918, unlawfully, wickedly, and maliciously conspire, confederate, and agree together feloniously, wilfully and of malice aforethought to kill and murder General Prisoner Shelby Hisle, Registered No. 13766.

Charge II: Violation of the 92nd Article of War.

Specification: In that General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garelick, Registered No. 12184; Orville Haskell, Registered No. 12288; Tony Peo, Registered No. 12496; Robert R. Le Cocq, Registered No. 12668; Donald Fisher, Registered No. 12667; Archibald N. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Scheiman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; Archie Writtenberry, alias Archie Whittenberry, Registered No. 13252; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534, acting jointly and in pursuance of a common intent, did, at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, on or about the 29th day of July, 1918, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and premeditatedly, kill General Prisoner Shelby Hisle, Registered No. 13766, a human being, by striking, kicking, stamping him and by cutting him with a knife.

JAMES B. ROUSSEAU,  
*1st Lieutenant, U. S. Army, Adjutant.*

That said petitioners are citizens of the United States and that on or about the 29th day of July, 1918, they were each serving sentences for terms of more than one year imposed by General courts-martial, at said Disciplinary Barracks, at Fort Leavenworth, Kansas, and were not then members of or serving as soldiers in the army or armies of the United States. That said sentences were imposed for alleged military offenses committed within the geographical limits of the United States during the year 1918.

4      That on the 19th day of October, 1918, the President of the United States, by an order published by the War Department on October 22nd, 1918, appointed a general court-martial for the purpose of trying your petitioners on said charge of murder. That said order appointing said general court-martial is in words and figures as follows:

"Special Orders, No. 247.

War Department.

*Extract.*

266: The following order is published for the information and guidance of all concerned:

War Department.

Washington, October 19, 1918.

By direction of the President, the general court-martial appointed in an order published in paragraph 439, Special Orders No. 225, War Department, September 25, 1918, to meet at Fort Leavenworth, Kan., is dissolved; and a general court-martial as hereinafter constituted is appointed to meet at Fort Leavenworth, Kans., at the call of the senior member for the trial of such persons as may be brought before it.

*Detail for the Court.*

Maj. Samuel A. Smoke, United States Army, retired;  
Capt. Henry M. Fales, United States Army, retired;  
Capt. Eric O. A. Miller, Quartermaster Corps;  
Capt. Harry C. Diesem, Engineer Corps;  
Capt. George Pulsifer, Adjutant General's Department;  
First Lieut. Marion Donker, United States Guards;  
Second Lieut. Richard M. Lewis, United States Guards;  
Second Lieut. William Jones, United States Guards;

Maj. Walter Smith, Coast Artillery Corps, Judge Advocate of the court; and

First Lieut. Louis A. Humason, Infantry, assistant Judge advocate of the court.

A greater number of officers can not be assembled without manifest injury to the service.

The court is empowered to proceed with the business before it with any number of members not less than the minimum prescribed by law.

Upon the final adjournment of the court the members, judge advocate and assistant judge advocate, will return to their proper stations.

NEWTON D. BAKER,  
*Secretary of War.*

The journeys required of the members of the court and the judge advocate in complying with this order are necessary in the military service (250, 45, A. G. O.).

5        By Order of the Secretary of War:

PEYTON C. MARCH,  
*General, Chief of Staff.*

Official:

P. C. HARRIS,  
*The Adjutant General.*"

That on the 4th day of November, 1918, pursuant to said order the said general court-martial convened at Pope Hall on the said military reservation at Fort Leavenworth, Kansas, and your petitioners were forcibly taken before said general court-martial and jointly placed upon trial on said charge of murder; that your petitioner Francis J. Cooney who was a drafted soldier at the time he became a general prisoner objected to the jurisdiction of said court-martial on the ground that the 92d Article of War prohibited the trial of any person by court-martial for murder committed within the geographical limits of the States of the Union in time of peace and that it was a time of peace in the State and District of Kansas and within the geographical limits of the United States on the 29th day of July, 1918; that all of your petitioners concurred in said objection to the jurisdiction of said court-martial; that said plea to the jurisdiction was then and there overruled by said court-martial and said court-martial, on and after said 4th day of November, 1918, from day to day to and including the 25th day of November, 1918, proceeded to try petitioners over said objection on said charge of murder and on said latter date found your petitioners guilty of said charge of murder and imposed sentences of death by hanging, on your petitioners, Alexander Kahn, Robert F. LeCocq and Donald Fisher and sentences of confinement at hard labor on each and every one of the other petitioners for the terms of their natural lives.

That on the 3rd day of February, 1920, the reviewing authority, to-wit: the President of the United States approved the findings of guilty of the charge and specification of murder and *and* 6        approved the sentence imposed as to each of your petitioners and commuted the sentence as to each of your petitioners, Alexander Kahn, Robert LeCocq and Donald Fisher to confinement at hard labor for the term of his natural life, and reduced the period of confinement at hard labor as to your petitioner, Francis J. Cooney, to twenty (20) years, and also reduced the period of confinement at hard labor provided in the sentence as to each of your petitioners William Cook, William Scheiman, George W. Jerue, William F. Peters, George A. Polson, and Millard Bowers to fifteen (15) years each and designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and further directed that said sentences as thus commuted and mitigated be carried into execution.

That on the 9th day of February, 1920, said findings, judgments

and sentences, together with the orders of the President were published by the War Department under an order designated "General Court Martial orders No. 21" which said order is in words and figures as follows:

"General Court-Martial Orders No. 21.

War Department.

Washington, February 9, 1920.

Before a general court martial convened at Fort Leavenworth, Kansas, November 4, 1918, pursuant to Special Orders, No. 247, War Department October 22, 1918, of which Major Samuel A. Smoke, U. S. Army, retired, was president, Major Walter Smith, Coast Artillery Corps, was judge advocate and 1st Lieut. Louis A. Humason, was assistant judge advocate, were arraigned and tried.

General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garelick, Registered No. 12184; Orville Maskell, Registered No. 12288; Tony Feo, Registered No. 12496; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Scheiman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534.

Charge I. "Violation of the 96th Article of War."

Specification: In that General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garelick, Registered No. 12184; Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970;

7 William Scheiman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; Archie Writtenberry alias Archie Whittenberry, Registered No. 13252; (Nolle prosequi pg. 334 W. S.); William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534; did, at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, on or about the 27th, 28th and 29th days of July, 1918, unlawfully, wickedly and maliciously conspire, confederate and agree together feloniously, wilfully and of their malice aforethought to kill and murder General Prisoner Shelby Hisle, Registered No. 13766.

Charge II. "Violation of the 92d Article of War."

Specification: In that General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garelick, Registered No. 12184; Orville Haskell, Registered No.

12288; Tony Feo, Registered No. 12496; Robert H. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Scheiman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; Archie Writtenberry alias Archie Whittenberry, Registered No. 13252; (Nolle prosequi pg. 334 W. S.); William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534; acting jointly and in pursuance of a common intent, did, at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, on or about the 29th day of July, 1918, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and premeditatedly, kill General Prisoner Shelby Hisle, Registered No. 13766, a human being, by striking, kicking, stamping him and by cutting him with a knife.

To which each and every one of the accused individually pleaded:

To The Specification, Charge I; "Not guilty."

To charge I: "Not guilty."

To the Specification, Charge II: "Not guilty."

To charge II: "Not guilty."

#### *Finding.*

The court finds the accused:

General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Scheiman, Registered No. 13012, Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; Millard Bowers, Registered No. 13534; each individually:

Of The Specification, Charge I: "Not guilty."

Of Charge I: "Not guilty."

The court finds the accused; General Prisoners Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Archibald M. Hawes, Registered No. 12945; Edward J. Swartwood, Registered No. 12970; Earl Ross, Registered No. 13128; each individually:

Of the Specification Charge II: "Not guilty."

Of Charge II: "Not guilty."

8 The court finds the accused: General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; William Scheiman, Registered No. 13012; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney,

Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; Millard Bowers, Registered No. 13534, each individually:

Of the Specification, Charge II: "Guilty, except the words "Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; Earl Ross, Registered No. 13128; "Stamping, and cutting him with a knife," substituting the word "and" before the word "kicking," of the excepted words "Not guilty," and of the substituted word, "Guilty."

Of Charge II: "Guilty."

*Sentence.*

The court therefore acquits the accused: General Prisoners Orville Haskell, Registered No. 12288; Tony Feo, Registered No. 12496; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; Earl Ross, Registered No. 13128; each individually.

The court sentences the accused: General Prisoners William Cook, Registered No. 11617; Abraham Garellick, Registered No. 12184; William Scheiman, Registered No. 13012; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; Millard Bowers, Registered No. 13534; each individually, to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life.

The court sentences the accused: General Prisoners Alexander Kahn, Registered No. 11680; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; each individually, to be hanged by the neck until dead. Two-thirds (2/3) of the members of the court concurred therein in each case.

The record of trial having been forwarded for the action of the President the following are his orders thereon:

In the foregoing case of General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Orville Haskell, Registered No. 12288; Toney Feo, Registered No. 12496; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; William Scheiman, Registered No. 13012; Earl Ross, Registered No. 13128; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; Harold J. Keyes, Registered No. 12917; and Millard Bowers, Registered No. 13534; The findings of not guilty of Charge I and the specification thereunder (as to all of the said above-named general prisoners, and the findings of not guilty of Charge II and the specification thereunder, as to General Prisoners Orville Haskell, Reg-

istered No. 12288; Tony Feo, Registered No. 12496; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; and Earl Ross, Registered No. 13128, are approved. The findings of guilty of Charge II and the specifications thereunder as to General Prisoner Harold J. Keyes, Registered No. 12917, and the sentence imposed upon the said General Prisoner, Harold J. Keyes, Registered No. 12917, are disapproved. General Prisoners Orville Haskell, 1, Registered No. 12288; Tony Feo, Registered No. 12496; Archibald M. Hawes, Registered No. 12945; Edward G. Swartwood, Registered No. 12970; Earl Ross, Registered No. 13128; and Harold J. Keyes, Registered No. 12917; will be restored to the status severally occupied by them at the commencement of these proceedings. The findings of guilty of Charge II and the specification thereunder and the sentence imposed as to each of the General Prisoners William Cook, Registered No. 11617; Alexander Kahn, Registered No. 11680; Abraham Garellick, Registered No. 12184; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; William Scheiman, Registered No. 13012; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; Francis J. Cooney, Registered No. 13378; George A. Polson, Registered No. 13415; and Millard Bowers, Registered No. 13534, are approved. The sentence as to each of the General Prisoners Alexander Kahn, Registered No. 11680; Robert R. Le Cocq, Registered No. 12666; and Donald Fisher, Registered No. 12667; is commuted to confinement, at hard labor, for the term of his natural life. The period of confinement at hard labor provided in the sentence as to General Prisoner Francis J. Cooney, Registered No. 13378; is reduced to twenty (20) years. The period of confinement at hard labor provided in the sentence as to each of the General Prisoners, William Cook, Registered No. 11617; William Scheiman, Registered No. 13012; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; George A. Polson, Registered No. 13415; and Millard Bowers, Registered No. 13534; is reduced to fifteen (15) years.

The period of confinement at hard labor provided in the sentence as to General Prisoner Abraham Garellick, Registered No. 12184, is reduced to two (2) years. The United States Penitentiary, Leavenworth, Kansas, is designated as the place of confinement of General Prisoners Alexander Kahn, Registered No. 11680; Robert R. Le Cocq, Registered No. 12666; Donald Fisher, Registered No. 12667; Francis J. Cooney, Registered No. 13378; William Cook, Registered No. 11617; William Scheiman, Registered No. 13012; George W. Jerue, Registered No. 13130; William F. Peters, Registered No. 13291; George A. Polson, Registered No. 13415; and Millard Bowers, Registered No. 13534; And the United States Disciplinary Barracks, Fort Leavenworth, Kansas, is designated as the place of confinement of General Prisoner Abraham Garellick, Registered No. 12184.

As thus commuted and mitigated, each and every of the sentences, with the exception of that imposed as to General Prisoner Harold

J. Keyes, Registered No. 12917, which is hereby disapproved, will be carried into execution.

WOODROW WILSON.

The White House,  
3 Feb'y, 1920.

By order of the Secretary of War:

*General, Chief of Staff.*

Official.

P. C. HARRIS,  
*The Adjutant General.*

10 And your petitioners further state that they are restrained of their liberty by respondent pursuant to the foregoing orders, judgments and sentences.

And your petitioners state that said orders, judgments and sentences were and are invalid for the following reasons:

That the order appointing said general Court-martial in violation of the provisions of the Fifth Article of War which requires that general courts martial shall not consist of less than thirteen members when that number can be convened without manifest injury to the service designated only eight persons to serve as members of said court martial, notwithstanding thirteen members could have been convened and the said order named only three officers in the military service of the United States competent to serve on said court-martial and only three such officers sat as members of said court-martial.

And the said general Order Numbered 21, published on February 9, 1920, and the said Special Orders No. 247, published October 19, 1918, show that the tribunal or court-martial by which your petitioners were tried, convicted and sentenced was not constituted as required by the laws of the United States concerning Courts-martial; that it appears from said orders and on the face of the proceedings that the President of said Court-martial, to-wit: Major Samuel A. Smoke, was not an officer in the military service of the United States; that Captain Henry M. Fales, was not an officer in the military service of the United States; and that said Smoke and Fales were retired from the military service of the United States, at the time of their detail and service on said Court-Martial; that it does not appear from the face of said proceedings that said Smoke and Fales consented to be assigned to active duty on said court-martial or that said Smoke and Fales were employed on active duty at the time they were assigned or detailed for service on said Court-Martial, or at the time of service thereon, that the record of said proceedings discloses that said persons did not possess the qualifications required by the 4th Article of War,

or by Clause A, Subdivision (b) of the Manual for Courts-  
11 Martial; that said record fails to disclose that they possessed  
the qualifications required by laws of the United States (Act  
of Apr. 23, 1904, 33 Stat. 264; Sec. 24, Act of June 3, 1916, 39 Stat.,  
183).

And your petitioners further show to the court that First Lieutenant Marion Donker, United States Guards, Second Lieutenant Rich-

ard N. Lewis, United States Guards, and Second Lieutenant William Jones, United States Guards, are not shown by the said record to be officers in the United States Army and that it does not appear whether said Guards were in the Coast Guard or Revenue Cutter Service or in what service of the United States said Guards were employed or that they were competent to serve as members of said General Court-Martial.

Your petitioners further state that the courts of the United States in the District of Kansas and throughout the United States and the courts of the State of Kansas and the several states, were, on the 29th day of July, 1918, and since have been and now are open and engaged in the free and uninterrupted and prompt administration of justice and that said 29th day of July, 1918, was a time of peace in the said State and District of Kansas and within the geographical limits of the States of the Union and the District of Columbia.

And your petitioners state that the rights of your petitioners under the 92d Article of War, which provides that no court-martial shall have jurisdiction to try any person for murder committed within the geographical limits of the Union and States and the District of Columbia, in time of peace have been violated by the said trial conviction and sentence on said charge of murder. And your petitioners state that their right to trial by jury on said charge has been violated and that their subjection to confinement under sentence of a court-martial, on said charge of murder and their trial and sentence by the United States acting through and by its President and army officers amounted to a violation of the rights of petitioners under the second section of Article Three of the Constitution of the United States which provides that:

12 "The trial of all crimes \* \* \* shall be by jury,"  
and also a violation of the rights of the petitioners under the Sixth Amendment to the Constitution of the United States, which provides that—

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

and also a violation of the rights of petitioners under the Fifth Amendment to the Constitution of the United States which provides that—

"No person shall be \* \* \* deprived of life, liberty or property without due process of law."

That said court-martial was also without jurisdiction under the said charge under the undisputed evidence adduced in support thereof by the prosecution to impose a sentence for murder for the reason that said charge alleges that said Hisle was killed by striking, kicking, stamping and by cutting him with a knife, and the said undisputed evidence on the part of the prosecution shows that said Hisle was killed not by being struck or kicked or stamped or by being cut with a knife, but that his death was the direct result

of a fall which caused his head to come in contact with an iron bar and caused a fracture of the skull from which said Hisle died.

And your petitioners show that said court-martial had no jurisdiction or authority, legally, to try and sentence them in the manner and form above stated; that the subjection of your petitioners to trial on said charge of murder and sentence by court-martial amounts to a usurpation on the part of the executive of judicial power and is a violation of the rights of petitioners under Section One of Article Three of the Constitution of the United States vesting the judicial power in the courts and under Section Two of said Article Three extending the judicial power to all cases in law arising under the Constitution and laws of the United States, thus and thereby depriving your petitioners of a trial before a tribunal in which the judicial power of the United States is lawfully vested.

13 That your petitioners were at said United States disciplinary barracks serving sentence imposed by general courts martial for alleged military offenses on and prior to the 29th day of July, 1918; that by said sentences your petitioners were discharged from the army of the United States long prior to said 29th day of July, 1918.

And your petitioners show to the court that the crime of murder as defined by the laws of the United States and the Articles of War, as construed by the courts and the war department is a crime against the civil power alone and not a military offense and that if the said 92 Article of War, essayed to give jurisdiction to a court-martial to try persons charged with murder committed within the geographical limits of the States of the Union when the courts were open and engaged in the administration of justice, then said Article would be wholly null and void and amount to an attempt on the part of Congress to deprive men of their lives without according them their constitutional rights under the aforementioned provisions of the Constitution of the United States. That your petitioners are illegally held, as aforesaid, in solitary confinement, as aforesaid, under or by color of the authority of the United States.

Wherefore, to be relieved of said unlawful detention and imprisonment, and the consequences of said void sentence your petitioners pray that a writ of habeas corpus to be directed to the said A. V. Anderson, Esq., may issue in this behalf, so that your petitioners may be forthwith brought before this Court to do, submit to, and receive what the law may require.

ALEXANDER KAHN,  
DONALD FISHER,  
ROBERT R. LE COQ,  
FRANCIS J. COONEY,  
WILLIAM SCHEIMAN,  
GEORGE W. JERUE,  
WM. F. PETERS,  
WILLIAM COOK,  
GEORGE A. POLSON,  
MILLARD BOWERS,  
*Petitioners.*

14 UNITED STATES OF AMERICA,  
*District of Kansas, etc.*

Alexander Kahn, Donald Fisher, Robert L. Le Cocq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook George A. Polson, and Miliard Bowers, depose and say that they are the petitioners named in the foregoing petition subscribed by them, and that the statements therein made are true as they verily believe.

ALEXANDER KAHN,  
DONALD FISHER,  
ROBERT R. LE COCQ,  
FRANCIS J. COONEY,  
WILLIAM SCHEIMAN,  
GEORGE W. JERUE,  
WM. F. PETERS,  
WILLIAM COOK,  
GEORGE A. POLSON,  
MILLARD BOWERS.

Subscribed and sworn to before me this 9th day of April, 1920.  
THOS. C. TAYLOR,  
[SEAL.] Notary Public, Leavenworth  
County, Kansas.

My Comm. expires Jan. 13, 1923.

**ISAAC B. KIMBRELL,  
MARTIN J. O'DONNELL,**  
*Attorneys for Petitioners.*

Filed in the District Court on April 14, 1920.

1

*Motion to Dismiss Petition.*

Comes now the respondent, August V. Anderson, Warden of the United States Penitentiary, at Leavenworth, Kansas, and moves the court for an order to dismiss the petition herein for a writ of habeas corpus for the following reasons:

First. That the application does not state facts sufficient to give the court jurisdiction to grant the writ as prayed.

Second. The Petition shows on its face that if the writ were granted the same would be discharged on the return, and the petitioners remanded to the custody of the respondent.

Third. The Petition shows on its face that the petitioners have not completed the term of imprisonment imposed by the judgment and sentence of the general court-martial, and that he is not entitled to release on habeas corpus at this time.

Wherefore, Respondent prays that petition be dismissed and the writ denied.

L. S. HARVEY,  
Assistant U. S. Attorney.  
*Attorney for Respondent.*

Filed in the District Court on May 6, 1920.

*Final Decree.*

This cause having been heretofore submitted to the court on the motion of the respondent to dismiss the petitioners' petition for a Writ of habeas corpus and the court having heard the arguments of counsel and being fully advised in the premises, doth sustain said motion for the reasons stated in said motion and it is by the court ordered, adjudged and decreed that the said petition for habeas corpus be and the same is hereby dismissed and that the respondent have and recover of and from the petitioners his costs herein expended.

Dated this 11th day of June, 1920.

JOHN C. POLLOCK,  
*Judge.*

Filed in the District Court on June 11, 1920.

*Petition for Appeal.*

Now come the petitioners, Alexander Kahn, Donald Fisher, Robert L. Le Cocq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson, and Millard Bowers, and conceiving themselves aggrieved by the decree and judgment rendered and entered in the above entitled cause, on the 11th day of June, 1920, do hereby appeal from said judgment and decree to the Supreme Court of the United States of America for the reasons specified in the assignment of errors, filed here-with and petitioners pray that their appeal may be allowed and that citation be issued, as provided by law, and that a transcript of the record proceedings, documents and papers upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States of America, under the rules of such court in such case made and provided.

ISAAC B. KIMBRELL.  
MARTIN J. O'DONNELL,  
*Solicitors for Petitioners.*

Filed in the District Court on June 11, 1920.

*Assignments of Error.*

Now come the petitioners herein and say that in the record and proceedings herein there is manifest error, in this:

- (1) The court erred in decreeing a dismissal of the petitioners' petition.

(2) The court erred in holding that the general court-martial had jurisdiction to try petitioners on a charge of murder.

(3) The court erred in holding to be valid and constitutional the 92nd Article of War, and that it authorized a general court-martial at a time and place when the courts were open to try your petitioners on a charge of murder.

(4) The court erred in denying to your petitioners the benefit of Section 2, of Article 3, of the Constitution of the United States providing that the trial of all crimes except in cases 17 of impeachment shall be by jury.

(5) The court erred in permitting respondent to deprive petitioners of their liberty under sentences rendered in violation of the rights of the petitioners under the 5th Amendment of the Constitution of the United States providing that no person shall be deprived of life, liberty or property without due process of law.

(6) The court erred in holding that the Executive power of the United States at a time when the courts were open could usurp judicial functions and exercise that judicial power which was exclusively vested in the courts by sections 1 and 2 of Article 3 of the Constitution of the United States.

(7) The court erred in holding that a tribunal composed of retired officers of the army and of United States Guards, were officers of the army of the United States, and that they possessed the qualifications required by the laws of the United States, for members of a general court-martial.

(8) The court erred in holding that a tribunal consisting of eight members could try the petitioners for their lives in violation of the provisions of the Fifth Article of War, requiring that General Courts-Martial shall not consist of less than thirteen (13) members.

(9) The court erred in holding that petitioners were not entitled to the protection of the Sixth Article of Amendment to the Constitution of the United States, providing that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed and that a court-martial had jurisdiction without the aid of a jury to try petitioners, for the crime of murder, at a time and place where the courts were open and during a time and place where peace existed within the meaning of the law.

And of the matters and things herein contained, petitioners  
18 pray the judgment of the court.

ISAAC B. KIMBRELL,  
MARTIN J. O'DONNELL,  
*Solicitors for Petitioners.*

Issuance and service of a citation herein waived. Appearance in the Supreme Court hereby entered.

*District Attorney for the Dist. of Kansas  
and Attorney for Appellee.*

Filed in the District Court on June 11, 1920.

*Order Allowing Appeal.*

On motion of petitioners Alexander Kahn, Donald Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson and Millard Bowers and it appearing to the court that this cause involves the instruction and application of the Constitution of the United States, and the constitutionality of a law of the United States.

It is hereby ordered that an appeal to the Supreme Court of the United States of America from the judgment and decree heretofore and on the 11th day of June, 1920, rendered and entered herein be and the same is hereby allowed and that a certified transcript of the record, motions, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States of America.

Dated this 11th day of June, 1920.

JOHN C. POLLOCK,

*Judge.*

*Bond.*

Know All Men By These Presents, that we, Alexander Kahn, Donald Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson and Millard Bowers, as principals and Martin

19 J. O'Donnell and Robert F. McKinstry, as sureties are held and firmly bound unto August V. Anderson, Warden of the

United States Penitentiary at Leavenworth, Kansas, in the full and just sum of Two Hundred and Fifty Dollars, (\$250.00) to be paid to the said August V. Anderson, his heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made we bind ourselves, our heirs, executors, administrators, successors or assigns jointly and severally by these presents.

Sealed with our seals and dated on this 11th day of June, 1920.

Whereas, lately at the April term of the United States Court for the District of Kansas, in a suit pending in said court wherein Alexander Kahn, Donald Fisher, Robert L. Le Coq, Francis J. Cooney, William Schieman, George W. Jerue, William F. Peters, William Cook, George A. Polson and Millard Bowers, the above named petitioners prayed for a writ of habeas corpus to discharge them from the custody of Respondent, August V. Anderson, Warden of the United States Penitentiary at Leavenworth, Kansas, judgment was rendered against the said petitioners and the said petitioners have obtained an appeal of the said court to reverse the

judgment and decree in the aforesaid suit and a citation directed to the said respondent, citing and admonishing him to be and appear in the Supreme Court of the United States of America, to be holden at Washington, District of Columbia, thirty days from and after the date of said citation.

Now the condition of the above obligation is such that if the said petitioners shall prosecute said appeal to effect and answer, all damages and costs, if they fail to make good their plea then the above obligation to be void, else to remain in full force and virtue.

ALEXANDER KAHN,

DONALD FISHER,  
ROBERT L. LE COOG,  
FRANCIS J. COONEY,  
WILLIAM SCHIEMAN,  
GEORGE W. JERUE,  
WILLIAM F. PETERS,  
WILLIAM COOK,  
GEORGE A. POLSON,  
MILLARD BOWERS,

*Petitioners.*

By MARTIN J. O'DONNELL,

*Their Attorney.*

MARTIN J. O'DONNELL,  
ROBERT F. MCKINSTRY,

*Sureties.*

20

Approved 11th day of June, 1920.

JOHN C. POLLOCK,

*Judge.*

Filed in the District Court on June 11, 1920.

*Principle & Proof of Service.*

To the Clerk of the United States District Court for the District of Kansas:

Please incorporate in the transcript of proceedings to be forwarded to the Supreme Court of the United States of America in the above entitled cause, the following:

- (1) Petition.
- (2) The Motion to Discuss Petition.
- (3) The Final Decree and Judgment.
- (4) Petition for Appeal.
- (5) Assignment of Errors.
- (6) Order Allowing Appeal.
- (7) Bond on Appeal.

ISAAC B. KIMBRELL,  
MARTIN J. O'DONNELL,  
*Solicitors for Petitioners.*

*Affidavit.*

STATE OF MISSOURI,  
*County of Jackson, et al:*

Martin J. O'Donnell of lawful age being duly sworn on his oath states that he served the above and foregoing Praecepte upon the Respondent by delivering a copy thereto to his attorney, L. S. Harvey, Assistant United States Attorney, for the District of Kansas, on this 11th day of June, 1920.

MARTIN J. O'DONNELL.

21 Subscribed and sworn to before me this 11th day of June, 1920.

[SEAL.]

HELEN HULL,

*Notary Public.*

My Commission expires May 31, 1921.

Filed in the District Court on June 11, 1920.

UNITED STATES OF AMERICA,  
*District of Kansas, et al:*

I, F. L. Campbell, Clerk of the District Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be true, full and correct copies of so much of the record and proceedings in Case No. 2081, entitled In the Matter of the Application of Alexander Kahn, et al. for a Writ of Habeas Corpus in said court, as is called for by the Praecepte filed herein.

I further certify that the Original Citation is attached hereto and returned herewith.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, in said District of Kansas, this 14th day of June, 1920.

[Seal of District Court U. S., District of Kansas.]

F. L. CAMPBELL,  
*Clerk.*

Endorsed on cover: File No. 27,778. Kansas D. C. U. S. Term No. 421. Alexander Kahn, Donald Fisher, Robert L. Le Corq. et al., appellants, vs. August V. Anderson, Warden of the United States Penitentiary at Leavenworth, Kansas. Filed June 25th, 1920. File No. 27,778.

SEP 20 1900

JAMES D. MAHER  
CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS.

ROBERT L. MALZER, ROBERT L.  
Appellants.

vs.  
CHARLES W. THOMAS, Warden of the United  
States Penitentiary at Leavenworth,  
Kansas, Respondent.

To the Clerk of the District Court of the United  
States for the District of Kansas:

NOTICE BY APPELLANTS TO ADVANCE.

ISAAC B. KIRKMAN,  
MARTIN J. O'DONNELL,  
Attorneys for Appellants.

In the  
**Supreme Court of the United States**  
October Term, 1920.

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ALEXANDER KAHN, DONALD FISHER, ROBERT L.  
LeCOCQ, *et al,* *Appellants.*

vs.

AUGUST V. ANDERSON, Warden of the United  
States Penitentiary at Leavenworth,  
Kansas, *Respondent.*

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*In Error to the District Court of the United  
States for the District of Kansas.*

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No. 421.

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**MOTION BY APPELLANTS TO ADVANCE.**

Come now the appellants and respectfully move  
the court to advance the above entitled case on  
the docket for hearing at the opening of the next  
term.

Appellants were convicted of the crime of murder by a General Court Martial and three of appellants were sentenced to be hanged and the others to imprisonment for life. The reviewing authority affirmed the sentences of conviction and modified said sentences so that three of appellants were sentenced to imprisonment for life, one to twenty years imprisonment and the others to fifteen years imprisonment each. The alleged murder was committed while appellants were inmates of the disciplinary barracks at Fort Leavenworth, Kansas, on July 29, 1918. The trial before the court martial was held at Fort Leavenworth, Kansas, in November, 1918.

A petition for a writ of habeas corpus was filed by appellants in the United States District Court for the District of Kansas on the 14th day of April, 1920, and a final decree dismissing said petition was entered on the 11th day of June, 1920.

Appellants prosecuted an appeal to this court from the final judgment of the District Court dismissing the petition upon the ground, amongst others, that under the 92nd Article of War the Court Martial was without jurisdiction to try appellants for murder committed within the geographical limits of the States of the Union in time of peace (that is when the courts were open, *Ex Parte Milligan*, 4th Wall, l. c. 128 and *Caldwell v. Parker*, 40 Sup. Ct. 388), and that the trial was held and sentence imposed in violation of the rights secured to appellants by Section 2 of Article 3 and by the 5th and 6th Articles of the Amendment to the Constitution. Appellants also

assert error was committed in that some of the members of the Court Martial were not qualified to act as members of the Court Martial, and that therefore they are restrained of their liberty in violation of the foregoing constitutional provisions.

Appellants base this motion to advance upon the ground that they are restrained of their liberty upon a criminal charge by virtue of the sentence of a pretended tribunal which was without jurisdiction to promulgate the sentence, and that therefore they are entitled to a speedy deliverance.

Notice of this motion has been served upon opposing counsel.

ISAAC B. KIMBRELL,  
MARTIN J. O'DONNELL,  
*Attorneys for Appellants.*

Kansas City, Mo., September 11, 1920.

*To the Solicitor General:*

Please take notice that the above motion will be presented to the court on the first day of the October, 1920, term.

ISAAC B. KIMBRELL,  
MARTIN J. O'DONNELL,  
*Attorneys for Appellants.*

FILED

APR 20 1948

U. S. DISTRICT COURT

UNITED STATES

vs.

JOHN R. KENNEDY

et al.

IN THE UNITED STATES

DISTRICT COURT

Appellants, **John R. Kennedy, Donald Pease, George L. Clegg, Edward J. Conner, William Schmitz, George W. Jones, William F. Pease, William Clegg, George A. Pease and Mrs. John Pease**, Appellees,

vs.  
Warden V. Armstrong, Warden of the United States Penitentiary at Leavenworth, Kansas, Respondent.

Appeal from the District Court of the United States for the District of Kansas.

STATEMENT, SHOT AND ARGUMENT FOR APPELLANTS.

Isaac B. Kimball and  
Martin J. O'Donnell,  
Attorneys for Appellants.

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In the  
Supreme Court of the United States  
**October Term, 1920.**

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ALEXANDER KAHN, DONALD FISHER, ROBERT L.  
LECOQ, FRANCIS J. COONEY, WILLIAM SCHIE-  
MAN, GEORGE W. JERUE, WILLIAM F. PETERS,  
WILLIAM COOK, GEORGE A. POLSON and MIL-  
LARD BOWERS, *Appellants,*

vs.

AUGUST V. ANDERSON, Warden of the United  
States Penitentiary at Leavenworth, Kansas,  
*Respondent.*

---

*Appeal from the District Court of the United  
States for the District of Kansas.*

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No. 421.

---

**STATEMENT, BRIEF AND ARGUMENT FOR  
APPELLANTS.**

**I. The General Nature of the Case.**

This is an appeal (Rec. 16) from a decree by  
the United States Court for the Kansas District,  
dismissing a petition (Rec. 2-13) for a writ of

*habeas corpus* to obtain the release of petitioners from the custody of respondent, the Warden of the United States Penitentiary at Leavenworth, Kansas.

## II. The Proceedings Below and the Appeal.

Respondent detains appellants in the penitentiary by virtue of certain judgments and sentences imposed by a general court-martial (Rec. 8-9-10) and by virtue of certain orders (Rec. 8-9-10) of the President of the United States, approving said sentences, and of the War Department publishing said orders (Rec. 6-10). The sentences and judgments were based upon a finding of guilty (Rec. 7-8) by said general court-martial, as to each appellant, of a charge of murder (Rec. 2-3) of one Shelby Hisle at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, on or about the 29th day of July, 1918 (Rec. 3). Appellants were charged by an army lieutenant, on August 31, 1918 (Rec. 2-3), with violation of the 96th Article of War (conspiracy to murder) and of the 92d Article of War (murder), and were tried on said charge before a court-martial from the 4th to the 25th days of November, 1918, inclusively, at Fort Leavenworth, Kansas (Rec. 5). Appellants objected to the jurisdiction of said court-martial on the ground that the court-martial was without jurisdiction to try any person by court-martial for murder committed in the geographical limits of the states of the Union in time of peace, and that it was a time of peace in the state and district of Kansas and

within the geographical limits of the United States on the 29th day of July, 1918. This was denied. On the 14th day of April, 1920, appellants filed their petition in the court below (Rec. 13). The respondent filed a motion to dismiss (Rec. 13-14) on the ground that the facts stated in the petition did not give the court jurisdiction to grant the writ as prayed; that the petition shows on its face that if the writ were granted the same would be discharged on the writ and appellants remanded to the custody of respondent, and that on the face of the petition the appellants had not completed the terms of imprisonment imposed by the judgment and sentence of the general court-martial and that they were not entitled to *habeas corpus*. This motion was sustained and a decree (Rec. 14) entered dismissing the cause. Thereupon, an appeal was allowed (Rec. 16) and the case brought here (Rec. 18). Upon appellants' motion presented at the convening of the court at this term, the cause was advanced and is now here for final determination.

### **III. Appellants' Contentions Are:**

A. Congress is without power to enact a law drafting citizens into the Army and subjecting them to trial while the courts are open for a capital crime committed within the United States against the ordinary law of the land by a court-martial.

B. Clause 14 of Section 8, Article 1 of the Constitution, must be interpreted in connection with and the powers granted must be exercised subject to the provisions of the Constitution com-

manding that all crimes, except in cases of impeachment, shall be tried by jury and that in all criminal prosecutions the accused shall enjoy the right to a trial by jury and that no person shall be deprived of life or liberty without due process of law.

C. The provisions of the Constitution of the United States concerning jury trial refer to the right to trial by jury as it was enjoyed by Englishmen when serving as soldiers in England at Common Law, and as it was enjoyed by Americans serving their country during the war of the Revolution and all succeeding wars until the World War, that is, by juries of the peers of the accused according to the known laws of the land.

D. The provision of the Fifth Amendment permitting the accusation of persons in the land forces by methods other than by presentment or indictment by a grand jury, involves a matter of *procedure* rather than of *substantial right* or the application of original justice. That provision did not operate to deprive a citizen conscripted into the army of his right to trial by jury for a capital crime (after having been accused in any way that Congress might provide), such as a soldier or citizen was entitled to at Common Law or under and by virtue of the acts of the Continental Congress during the Revolutionary War.

E. The 92d Article of War prohibits the trial of every person, military or non-military, for the crime of murder committed within the geographical limits of the states of the Union and the District of Columbia in time of peace, that is at a time when the courts are open, and prohibited

the executive power from trying appellants by court-martial for the reason that on the 29th day of July, 1918, the courts were open in the state and district of Kansas and within the geographical limits of the states of the Union and the District of Columbia and it was therefore a time of peace within said limits.

F. The law recognizes a distinction between domestic and foreign wars, and the question as to whether or not a state or time of war existed insofar as personal rights are involved is to be determined by the records and judges of the courts of justice, and not by the records, officers or acts of any other department of the Government.

G. The Armistice between the Allied Powers and Germany of November 11, 1918, ended the war with Germany as a fact and also ended the power existence and jurisdiction of a tribunal which was called into being only by the actual existence of a state of actual war. The 92d Article of War in the nature of things must be transposed to read "no person shall be tried in time of peace by court-martial for murder, etc." As the trial did not end until two weeks after the war ended the sentence could not be promulgated by a maritime tribunal.

H. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no intention to take away from them the jurisdiction which they had always exercised with respect to soldiers and citizens can be ascribed to Congress in the absence of clear and direct language to that effect. Hence, the prohibition in the

92d Article of War denying jurisdiction to courts-martial to try soldiers for murder committed in time of peace prevented the court-martial in question from trying appellants.

I. The order detailing the court-martial was not in accordance with the requirements of the 4th Article of War which requires that members of army courts-martial must be officers in the Military service or Marine Corps, and it appears from the detail and from the orders of the President of the United States, that the President of the court was not an officer in the army, but that he was an officer who had *retired from the army*, and this is true as to another member of the court, named Fales. Three other members were designated as United States guards and it does not appear whether the guards were military guards or coast guards or that they were officers in the army of the United States or the Marine Corps.

J. The detail of eight instead of thirteen members, in violation of the 5th Article of War, which expressly commands that the number of officers on general courts-martial shall not consist of less than thirteen (13), when that number can be convened without manifest injury to the service, and this, notwithstanding the fact that the records of the war show that there were hoards of army officers from whom the President could have selected thirteen without manifest injury to the service.

K. The necessity of maintaining discipline in the army does not authorize Congress, by virtue of its Constitutional power, to make rules for the government of the land forces or to enact laws

providing that citizens may be deprived of their right to jury trial when charged with a capital crime, even if the end sought to be accomplished by such law be legitimate, but no such assumed necessity exists.

L. Appellants were not in or members of the land or naval forces of the United States on July 29th, 1918, hence they could not be tried for a capital crime by a court-martial. The original sentences by which they became general prisoners discharged them from the army.

M. *The express recognition in the first Articles of War adopted by the Continental Congress of the right of a soldier charged with a capital crime, during time of war, to a trial by jury, and the executive, legislative and judicial recognition of that right during all the wars in which this country was engaged until 1863, was merely a recognition of the right in that respect enjoyed by soldiers at common law, and the rule that the provisions of the Constitution concerning the right to trial by jury will be interpreted with reference to the common law and previously existing legislation in connection with the rule that the practical interpretation of a law by all the departments of the Government for a long series of years demonstrates that the Constitution itself expressly preserves a soldier's right to be tried by a jury when charged with a capital crime, and that Congress under the guise of making rules for the government and regulation of the land forces can never take it away.*

### **Constitutional Provisions Involved:**

#### **Section 8, Article 1:**

"The Congress shall have power  
 \* \* \* \* \*  
 To raise and support armies  
 \* \* \* \* \*  
 To make rules for the government and regulation of the land \*\*\* forces  
 \* \* \* \* \*  
 To make all laws which shall be necessary and proper for carrying into effect the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department thereof."

#### **Clause 3 of Section 2 of Article 3:**

"The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crime shall have been committed."

#### **Article 5 of the Amendments:**

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger \*\*\* nor be deprived of life, liberty or property without due process of law \*\*\*"

#### **Article 6 of the Amendments:**

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state or dis-

trict wherein the crime shall have been committed \* \* \*

#### Article 9 of the Amendments:

"The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."

#### Article 10 of the Amendments:

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states are reserved to the states respectively or to the people."

#### **Acts of Congress and Articles of War Involved:**

"Section 1342. The articles included in this section shall be known as the Articles of War and shall at all times and in all places govern the armies of the United States."

"Article 2. *Persons subject to military law.*—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law', or 'persons subject to military law', whenever used in these articles."

"(d) All persons under sentence adjudged by courts-martial;"

"Article 4. *Who may serve on courts-martial.*—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial."

"Article 5. *General Courts-Martial.*—General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service."

"Article 12. *General Courts-Martial.*—General courts-martial shall have power to try any person subject to military law for any crime or offence made punishable by these articles and any other person who by the law of war is subject to trial by military tribunals."

"Article 92. *Murder—Rape.*—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but *no person* shall be tried by court-martial for murder or rape committed within the geographical limits of the State of the Union and the District of Columbia *in time of peace.*"

## ASSIGNMENTS OF ERROR.

The assignments of error (Rec. 14-15) are that the court below erred in:

- (1) Decreeing a dismissal of the petition
- (2) Holding that the general court-martial had jurisdiction to try petitioners on a charge of murder.
- (3) Holding to be valid and constitutional the 92d Article of War, and that it authorized a general court-martial at a time and place when the courts were open to try your petitioners on a charge of murder.
- (4) Denying to appellants the benefit of Section 2, of Article 3, of the Constitution of the United States providing that the trial of all crimes except in cases of impeachment shall be by jury.
- (5) Permitting respondent to deprive appellants of their liberty under sentence rendered in violation of the rights of the petitioners under the 5th Amendment of the Constitution of the United States providing that no person shall be deprived of life, liberty or property without due process of law.
- (6) Holding that the executive power of the United States at a time when the courts were open could usurp judicial functions and exercise that judicial power which was exclusively vested in the courts by Section 1 and 2 of Article 3, of the Constitution of the United States.
- (7) Holding that a tribunal composed of retired officers of the army and of United States

Guards, were officers of the army of the United States and that they possessed the qualifications required by the laws of the United States, for members of a general court-martial.

(8) Holding that a tribunal consisting of eight members could try the petitioners for their lives in violation of the provisions of the Fifth Article of War, requiring that general courts-martial shall not consist of less than thirteen (13) members.

(9) Holding that petitioners were not entitled to the protection of the Sixth Article of Amendment to the Constitution of the United States, providing that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed and that a court-martial had jurisdiction without the aid of a jury to try petitioners, for the crime of murder, at a time and place where the courts were open and during a time and place where peace existed within the meaning of the law.

**BRIEF AND ARGUMENT.**

## I.

Notwithstanding Congress by express constitutional provision has the power to prescribe rules for the government and regulation of the army, those rules must be interpreted in connection with the provision that the trial of all crimes except in cases of impeachment shall be by jury and that in all criminal prosecutions the accused shall enjoy the right to a trial by jury and that no person shall be deprived of life or liberty without due process of law. The former provision must not be interpreted so as to nullify the latter provisions.

Section 2 of Article III, specifically providing that

"The *trial of all crimes, except in cases of impeachment,* shall be by jury,"

contains a limitation upon the power of Congress or the executive to subject any person whatsoever to trial on a *capital criminal* charge *except in the cases included in the exception*, to-wit, *cases of impeachment*. The Sixth Amendment, using the impersonal and all embracing words, "In *all criminal* prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," is a command to the Government and a limitation upon its power prohibiting it from subjecting any person to any species or variety of trial in a criminal prosecution except by jury, and the same result follows from the prohibition of the Fifth

Amendment forbidding deprivation of life or liberty without due process of law.

The Fifth Amendment makes a "presentment or indictment of a grand jury" a condition precedent to the right of the Government to *hold* any person "to *answer* for a capital or otherwise infamous crime" except in cases arising in the land or naval forces, or in the militia, "when in actual service in time of war or public danger."

Manifestly the Fifth Amendment does not modify the provisions of Sec. 2 of Art. III, commanding that "the *trial of all crimes* \* \* \* shall be by jury," or of the Sixth Amendment, commanding that "In *all criminal prosecutions* the accused shall enjoy the right to a speedy and public *trial* by an impartial jury," or of the Fifth Amendment commanding that "No person \* \* \* shall be deprived of life, liberty or property without due process of law."

The third Article and the Sixth Amendment provides for the method or mode of *trial* of an *accused*. The Fifth Amendment points out the way in which a person *shall be accused* except in certain cases. That is to say, the Fifth Amendment does not point out the way in which a person shall be *accused* in cases arising in the land forces. It then becomes pertinent to inquire how does the Constitution provide for the *accusation* in such cases and whether or not the Constitution provides for the mode of trial to be followed in such cases.

Section 8 of Article I provides that "The Congress shall have power:

"To raise and support armies \* \* \*;  
To provide and maintain a navy;  
To make rules for the government and regulation of the land and naval forces.  
\* \* \* \* \*

To make all laws which shall be *necessary* and *proper* for carrying into execution the foregoing powers."

The Fifth Amendment excepts cases arising in the land forces from the rule governing the *method of accusation* (indictment), but contains no exception concerning the *right of trial by jury*. We think that the maxim, "*Expressio unius est exclusio alterius*," is applicable here. The express exception of cases of impeachment from the constitutional provision that the *trial* of all crimes shall be by jury and the express exception of cases arising in the land forces from the rule requiring an *indictment* or *presentment* by a grand jury before any person shall be held to answer for a capital or otherwise infamous crime, bring the cases of persons in the land forces within the command of the constitution that the *mode of trial* for crimes against society shall be the same for all persons, soldiers and citizens. In 12 C. J. 707 it is said:

"Under the maxim, *Expressio unius est exclusio alterius*, the enumeration of certain specified things in a constitutional provision will usually be construed to exclude all things not thus enumerated."

The enactment of a law authorizing a court-martial to try a soldier for a civil crime when the courts are functioning can hardly be a rule which is necessary and proper for the regulation or government of the land forces. A person who commits a crime against society and thereby violates a law to which society attaches a penal sanction should be tried in the ordinary courts established by that society for its preservation. The powers above enumerated must be construed so as not to nullify the provisions of the Constitution which guarantee fundamental rights to the citizen whether he be arrayed in the garb of a soldier or a civilian. The courts from the time of the formation of the nation on the few occasions when the members of the standing army or the navy sought relief on *habeas corpus* from court-martial proceedings denied same on the theory that the petitioners were guilty of infractions of *military rules* and regulations and that trial and punishment for such infractions before courts-martial did not prevent their prosecution for the same crime before the courts of the United States. This rule was followed until the decision in *Grafton v. United States*, 206 U. S. 333, established the principle that a soldier is entitled to invoke the constitutional guaranties. There the Supreme Court held that the provision of the Fifth Amendment that no person could be twice put in jeopardy of life or limb applied to a soldier acquitted by a court-martial. Said the court:

"Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the army,

*but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be interpreted so as to nullify the latter.*<sup>29</sup>

If the constitutional provision giving Congress the power to make rules for the government and regulation of the army *must not be interpreted so as to nullify the jeopardy clause of the Fifth Amendment*, it follows that persons in the land and naval forces may still invoke the protection of every other clause and of every other amendment. An interpretation of the provision giving the Congress the power to make rules which nullifies the right of a soldier when charged with a crime against the United States *to a trial by jury within the geographical limits of the United States* where the courts are open is not a permissible interpretation under the decision in the Grafton case. If he has a right to invoke that clause of the Fifth Amendment providing that "nor shall any person for the same offense be twice put in jeopardy of life or limb," it is difficult to understand how he happens to be prohibited from invoking the provisions of the Sixth Amendment expressly granting to the accused "in all criminal prosecutions" the right to a public trial by jury or to invoke the provisions of Section 2 of Article III of the Constitution providing that the trial of "all crimes \* \* \* shall be by jury" excepting only in cases of impeachment, or to invoke that clause of the Fifth Amendment guaranteeing due process of law. In the Grafton case this court expressly holds that a

prosecution for homicide before a court-martial is a "criminal prosecution" and that it so operates upon the "civil offense" as to prevent a prosecution therefor in a civil court of the same Government. If a soldier can successfully invoke one provision, why not every other?

The claim that the Grafton decision determined that the trial of Grafton without a jury was legal and therefore that the question as to whether or not a soldier could claim the protection of the constitutional guaranties was directly presented and decided in that case adversely to our contention, is without merit when we reflect that Grafton was tried for a non-capital offense in the Philippines, beyond the geographical limits of the States of the Union, and that no person, soldier or civilian, can successfully claim the right to a jury trial in the Philippines (*Dorr v. United States*, 195 U. S. 138). Furthermore, Grafton did not invoke the right to a jury trial and it was conceded by the Government and by Grafton, as we also concede, that Congress has power to create any sort, kind or variety of tribunal for the trial of persons charged with crime beyond the geographical limits of the United States in cases where Congress has not enacted a law extending the Constitution of the United States to the territory in which the accused is being tried (*Dorr v. U. S.*, *supra*; *Ross Case*, 140 U. S. 453).

Art. I, Sec. 8, Clause 14, and Art. III, Sec. 2, Clause 3, were the only provisions in the Constitution before the adoption of the first ten amend-

ments applicable to the question under consideration. Those provisions read:

- “The Congress shall have power: \* \* \*
- To make rules for the government and regulation of the land \* \* \* forces.” (Art. I, Sec. 8, Cl. 14.)
- “The trial of all crimes, except in cases of impeachment, shall be by jury.” (Art. III, Sec. 2, Clause 3.)

The power to make rules for the government and regulation of the land forces did not operate to constitute an additional exception to the all-embracing command of Art. III, Sec. 2, Clause 3. According to the contention of the Government that clause must read, “The trial of all crimes, except in cases of impeachment, *and except in cases arising in the land forces*, shall be by jury.” But if it be permissible to write one exception into said clause merely because Congress is given power to make rules for the government and regulation of the land forces, then by the same mode of reasoning it would also be permissible to write another exception based on Clause 2 of Sec 3 of Art. IV, giving Congress power to make all needful rules and regulations respecting the territory of the United States. It would likewise be permissible to write an exception based on Clause 6 of Sec. 8 of Art. I, giving Congress power to provide for the punishment of counterfeiting the securities and current coin of the United States, or Clause 10, giving Congress power to define and punish piracies and felonies committed on the high seas,

and offenses against the law of nation, and so on *ad infinitum* until the clause would read:

"The trial of all crimes, except in cases of impeachment (and except in cases in the land and naval forces, and except in cases where crimes are committed in a territory of the United States, and except in cases where the securities and coin of the United States are counterfeited, and except in cases where piracies and felonies are committed on the high seas, and except in cases where offenses are committed against the law of nations, etc.), shall be by jury."

It would be no more absurd to write the last additional exception than the first into the clause in question. But if any were written in, what becomes of the violation of the ordinary rules of grammatical construction? What becomes of the rule that an express exception from a law is an affirmation of the application of the law to all cases not excepted? What becomes of the rule that all cases not within an exception are excluded from its operation?

The exception in the Fifth Amendment concerning the mode in which the *accusation* of persons in the land forces might be formulated before putting such persons on *trial* for capital or infamous crimes was a recognition by the people that without such amendment the soldier could be accused only in the same manner as the non-military citizen.

Until the decision in the Grafton case, it was held by the Supreme Court in the few instances in which the question reached it that soldiers could not claim a citizen's right under the Constitution.

(See note to *Grafton v. U. S.*, 11 A. & E., Ann. Cas. 640, where the editor cites authorities announcing the old rule.)

We know of but one other case in which the question here involved has been passed upon by a Federal court. In *Ex Parte Henderson*, 11 Fed. Cas., No. 6349, the court said:

"The Constitution of the United States in the Third Subdivision of Section 2, Art. 3, provides that 'the trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed, but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed.' The difficulty is in finding, in spite of this provision, *any authority in Congress to provide for the trial of even persons in the army or navy, or in the militia, for crime, otherwise than by jury.* \* \* \*

The fact that in July, 1918, this country was engaged in a war with Germany did not operate to deprive the appellants of the protection of not claim a citizen's right under the Constitution. This and other courts have held that the war powers of Congress both in time of peace and war, must be exercised subject to the due process clause of the Fifth Amendment.

In *Hamilton v. Kentucky Distillery & Warehouse Co.*, 40 S. C. 106, on November 20, last, the court said:

"The exercise of the war powers is (except in respect to property destroyed by military

operations, *U. S. v. Pac. R. R. Co.*, 120 U. S. 227) subject to the Fifth Amendment."

Chief Justice Taney in *U. S. v. Carpenter*, Vol. 2, Davis' Rise and Fall of the Confederate Government, page 348, said:

"A Civil War, or any other, does not enlarge the powers of the Federal Government over the state or the people beyond what the compact has given to it in time of peace. A state of war does not annul the tenth article of the Amendments to the Constitution, which declares that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people, nor does a civil war, or any other war, absolve the judicial department from the duty of maintaining with an even and firm hand the rights and powers of the Federal Government and of the states, and of the citizens, as they are written in the Constitution, which every judge is sworn to support.'"

In *ex parte Milligan*, 4 Wallace, the court said:

"The Constitution of the United States is the law for rulers and people equally, in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences, was ever invented than that any of its provisions can be superseded during any of the great exigencies of the Government. Such a doctrine leads directly to anarchy or despotism. But the theory of necessity on which it is based is false. For the Government, within

the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been proven."

We think the principle applied in the Grafton & Henderson cases controls the case. That principle could not be applied unless the soldier was entitled to invoke the protection of the Bill of Rights. We propose to demonstrate under the next point discussed that the exception in the Fifth Amendment concerning the mode of *accusation* in cases arising in the land and naval forces was an exception concerning a mere matter of *procedure*, and that it left the soldier, concerning his *substantial rights*, with reference to the mode of trial for capital crimes, in exactly the same situation as he was at common law and as the ordinary citizen is today.

## II.

The provisions of the Constitution of the United States concerning jury trial refer to the right to trial by jury as it was enjoyed by Englishmen in England at common law. The common law knew no distinction between citizen and soldier. The provision of the Fifth Amendment permitting the accusation of persons in the land and naval forces by methods other than by presentment or indictment of a grand jury involves a matter of procedure rather than of substantial right. That provision did not operate to deprive a citizen conscripted into the army of his right to a trial by a jury (after having been accused) such

**as a soldier or citizen was entitled to at common law.**

To determine whether or not a conscript soldier has lost his rights under the Constitution at the instance of the government in accordance with the provisions of "the law of the land" when he has been tried by a court-martial and put to death pursuant to its sentence, it is necessary to examine and determine what the rights of a soldier were at common law and during the period between the time the Revolution began and the adoption of the Constitution. This for the reason that the "law of the land" which applied to such person at common law and during the revolutionary period must be held to be the variety of law which he is entitled to invoke under the Constitution. The first and leading case in which the clause of the Fifth Amendment forbidding the Government from depriving any person of property, liberty or life "without due process of law," or the "law of the land," was construed by the Supreme Court in *Murray's Lessee et al v. Hoboken Land and Improvement Co.*, 18 How. 272, l. c. 276. It is there said:

"The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta. Lord Coke, in his commentary on these words (2 Inst. 50), says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the federal constitution, following the language of the great charter more closely, generally contained the

words, 'but by judgment of his peers, or the law of the land.'

\* \* \* \* \*

The constitution of the United States, as adopted, contained the provision that 'the trial of all crimes except in case of impeachment, shall be by jury'; when the Fifth Article of Amendment was made, the trial by jury had already been provided for. But the Sixth and Seventh Articles of Amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the State Constitutions and in the Ordinance of 1787, the words of Magna Charta, and declared that no person shall be deprived of his life, liberty or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause 'law of the land' without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator and Magna Charta had declared to be the true meaning of the phrase, 'law of the land,' in that instrument, and which were undoubtedly then received as their true meaning.

\* \* \* \* \*

To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, *we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the immigration of our ancestors, and which are shown not to have been unsuited to*

*their civil and political condition by having been acted on by them after the settlement of this country."*

In *U. S. v. Reid*, 12 How. 360, l. c. 363, it is said:

"The colonists who established the English colonies in this country undoubtedly brought with them the common and statute laws of England, as they stood at the time of their emigration, so far as they were applicable to the situation and local circumstances of the colony. And among the most cherished and familiar principles of the common law was the trial by jury in civil, and still more especially in criminal cases."

In *Murray v. Ry.*, 62 Fed. l. c. 27, it is said:

"When the Constitution of the United States was adopted it was based upon the general principles of the common law, and its correct interpretation requires that the general provisions thereof shall be read in the light of these general principles. The final disruption of all political ties between the colonies and the mother country did not terminate the existence of the common law in the Colonies. It came originally into the several Colonies, not by force of legislative enactment to that effect by the Parliament of Great Britain, and the effect of which might be held to have terminated when the Colonies became independent, but, as is said by Mr. Justice Story, speaking for the Supreme Court in *Van Ness v. Pacard*, 2 Pet. 137-144: 'Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that

portion which was applicable to their condition."

In *Chisholm v. Georgia*, 2 Dall. 419, l. c. 435, the court said:

"The only principles of law, then, that can be regarded are those common to all the states. I know of none such which can affect this case, but those which are derived from what is properly termed 'the common law,' a law which, I presume, is the groundwork of the laws in every state in the Union and which I consider, so far as applicable to the peculiar circumstances of this country, and where no special act of the legislature controls it, to be in force in each state *as it existed in England (unaltered by any statute) at the time of the first settlement of the country.*"

(Italics by the court.)

In *Twining v. New Jersey*, 211 U. S. 78, l. c. 100, 102, it is said:

"What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England *before the emigration* of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. \* \* \*

\* \* \* \* \*

*No change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to*

time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government."

It then becomes pertinent to inquire to what extent the common law right of trial by jury was adopted in this country within the meaning of the Constitution. In *Callan v. Wilson*, 127 U. S. 540, l. c. 549, it is said:

"The Third Article of the Constitution provides for a jury in the trial of 'all crimes, except in cases of impeachment.' The word 'crime,' in its more extended sense, comprehends every violation of public laws; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at *common law*, determine whether the accused, in a given class of cases, was entitled to be tried by a jury."

Holding that there was no conflict between the provision of the Third Article providing that "the trial of all crimes, except in cases of impeachment, shall be by jury," and the Sixth Amendment, the court said:

"We do not think that the amendment was intended to supplant that part of the Third Article which relates to trial by jury. There is no necessary conflict between them. \* \* \* As the guarantee of a trial by jury, in the Third Article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in

criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property."

In *Capital Traction Company v. Hof*, 174 U. S. 1, l. c. 6, it is said:

"The first Continental Congress, in the Declaration of Rights adopted October 14, 1774, unanimously resolved that 'the respective colonies are entitled to the *common law of England*, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.'"

On page 8 the court, holding that the people in adopting the Constitution did not adopt it with reference to the various methods in which the right was enjoyed in the colonies or in the states prior to the adoption of the Constitution, said that the people, in adopting the provisions of the Constitution with reference to jury trials,

"had in view of the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the states."<sup>2</sup>

In *Schick v. United States*, 195 U. S. 1, l. c. 69, it is said:

"It must be read in the light of the common law, 'That,' said Mr. Justice Bradley, in *Moore v. United States*, 91 U. S. 270, 274, referring to the common law, 'is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many Acts of Congress could not be understood without reference to the common law.' Again, in *Smith v. Alabama*, 124 U. S. 465, 478, is this declaration by Mr. Justice Matthews: 'The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' In *United States v. Wong Kim Ark*, 169 U. S. 649, 654, Mr. Justice Gray used this language: 'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution."

The reason for incorporating the common law guaranties in the sense understood in Coke's day with reference to jury trial in the Constitution was strengthened by the consideration that the judges under the Stuart Kings usurped the duty of the jury and decided not only the law but the facts. On the bloody circuit jurors were coerced to render verdicts contrary to both the law and the facts. (Vol. I, p. 506, Macaulay's History of England.) This departure from the ancient rule of the common law that "in questions of law

judges respond; in matters of fact, the jury" (Littleton's case, 10 Coke's Rep., p. 56, b) caused such detestation of this arbitrary conduct on the part of judges that after the revolution of 1688 the pendulum swung the other way, so that both in England and the Colonies for a long period jurors were held to be judges not only of the facts but of the *law also*. (See note said to be appended by the late Justice Gray to *Irving v. Craddock*, 1 Quincy's Reports [Mass.] 553, and his dissenting opinion in *Sparf and Hansen v. U. S.*, 156 U. S. 51, 715.) Misled by the then current notion, the Supreme Court of the United States in *Georgia v. Brailsford*, 3 Dall. 1, followed the post revolutionary custom and ruled that jurors were judges of the *law* and the facts. This ruling, however, overlooked the fact that the Continental Congress on October 14, 1774, declared that the Colonies were entitled to the common law of England and the great and inestimable privilege of being tried by their peers of the vicinage *according to the course of that law*. (*Traction Co. v. Hof*, 174 U. S. 1. c. 6.) The later decisions of this court finally established the doctrine that the right to jury trial mentioned in the Constitution was the counterpart of the right enjoyed by Englishmen at the common law. (*Callan v. Wilson*, 127 U. S. 540, 1. c. 549; *Traction Co. v. Hof*, 174 U. S. 1. c. 6; *Schick v. U. S.*, 195 U. S. 65, 1. c. 69.) That the judicial power mentioned in the Constitution extended to both civil and criminal cases and that in determining to what cases that power extended the court would assume that the Constitution was adopted with reference to the common law of

England as it stood in the fourth year of James I., the time of the first English settlement of the Colonies. (*Chisholm v. Georgia*, 2 Dall. 419, l. c. 435; *Tennessee v. Davis*, 100 U. S. 257.)

It thus appears that the right to trial by jury which the Constitution was intended to secure was the right which was applicable to all persons and cases at the common law in England from the time of the adoption of the Great Charter.

The next question is, did those inhabitants of England whom the King compelled to serve in his armies or who rendered military service to their country, when on trial for crime within the geographical limits of England, enjoy the right to a trial by jury? That they did is demonstrated by the following:

By the law of England at the time of the Norman Conquest the only penalty which could be imposed for a military offense was forfeiture of the land of the offending soldier. In *Domesday Book and Beyond* (Maitland, p. 295) it is said:

"Such rules when regarded from one point of view may well be called feudal. Book-land having been derived from, is specially liable to return to the King. It will return to him if the holder be guilty of shirking his military duty or of other disgraceful crime."

This law empowered the King to declare the forfeiture. In course of time the Kings so abused this power that it was taken away by *Magna Charta*. From the time of the adoption of that Charter to the year 1689 the law of England made no distinction between the soldier and civilian

(See Petition of Right, 5 Car. 1, A. D. 1627; Mutiny Act, Stat. of Realm, Vol. 6, pp. 55-56; 1 Wm. & M. c. 5; Macaulay's History of England, Vol. III, p. 34; Vol. 3, Campbell's Lives of the Chief Justices, 91; *Ex Parte Reed*, 100 U. S. 13. l. c. 21; Blackstone's Commentaries, Book 1, 413; 3 Inst., 52; Military Law and War-time Legislation [West Pub. Co. 1919], pages 1 to 5.)

The rule at common law in this regard is thus enunciated by Coke (Inst. III, p. 52):

"If a lieutenant, or other that hath commission of marshall authority, in time of peace hang, or otherwise execute any man by colour of marshall law, this is murder, for this is against Magna Charta cap. 29, and is done with such power and strength, as the party cannot defend himself; and here the law implieth malice. *Vide Pafch.* 14 E. 3. in Scaccario the abbot of Ramfeys case in a writ of error in part abridged by Fitzh. tit. *Scire fac.* 122. for time of peace.

Thom. countee de Lancaster being taken in an open insurrection, was by judgement of marshall law put to death, in anno 14 E. 4. This was adjudged to be unlawfull, *eo quod non fuit arrainiatus, rainiatur, seu ad responsionem positus tempore pacis, eo quod cancellaria, et aliae curiae regis, fuerunt tunc apertae, in quibus lex fiebat unicuique, prout fieri conuevit, quod contra cartam de libertatibus cum dictus Thomas fuit unus parium et magnatum regni non imprifonetur, etc. Nec dictus rex super cum ibit, nec super cum mitter, nisi per legale judicium parium suorum, etc. tamen tempore pacis absque arraniamento, seu responsione, seu legali judicio parium suorum, etc. adjuicatus est morti.*"

The Chapter of Magna Charta which Coke said would be violated by such an act is as follows:

"No freeman shall be taken, or imprisoned, or be dispossessed of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him nor condemn him, but by lawful judgement of his peers, or by the law of the land. We will tell to no man, we will not deny or defer to any man either justice or right."

In his commentary on this chapter (Inst. II, p. 46) Coke says:

"No man shall be in any sort destroyed (*deftruere, i. quod prius structum, et factum fuit, penitus evanescere et diruere*) unleesse it be by the verdict of his equals, or according to the law of the land.

No man shall be condemned at the kings suite, either before the king in his bench, where the pleas are *coram rege* (and so are the words, *nec super eum ibimus*, to be understood), nor before any other commissioneer, or judge whatsoever, and so are the words, *nec super eum mittemus*, to be understood, but by the judgement of his peers, that is, equals, or according to the law of the land."

(Inst. II, p. 48):

"No man destroyed, &c.

That is, fore-judged or life, or limbs, dispossessed, or put to torture, or death.

The Mirror writing of the auncient laws of England, faith, *foloient les roys faire droit a tous, per eux, ou per leur chiefe justices.*

*et ore les faits les royes per lour justices commissaires errants affignes a touts pleas: en aid de tiels cires font tornes de viscounts neceſſaries, et vices de frankpl, et quant que bones gentz a tiels inquests inditerent de peche mortel, foloient les royes deftruere fans respons, &c. Accord eft, que nul appelle, ne enditee foit deftroy fans respons.* Thomas earle of Lancaster was deftroyed, that is, adjudged to die, as a traitor, and put to death in 14 E. 2, and a record thereof made: and Henry earle of Lancaster his brother, and heire, was reſtored for two principall errors in the proceeding againſt the faid Thomas Earle, L. *Quod non fuit araniatus, et ad responſiones positus tempore pacis, eo quod cancellaria, et aliae curiae regis fuer' apertae, in quibus lex fiebat unicuique, prout fieri conſuevit.* 2. *Quod contra cartam de libertatibus, cum dictus Thomas fuit unus parium, et magnatum regni, in qua continentur* (and reciteth this chapter of Magna Charta, and ſpecially, *quod dominus rex non fuper eum ibit, nec mittet, niſi per legale judicium parium fluorum tamen per recordum praedictum, tempore pacis abfq; aranamento, seu responſione, seu legali judicio parium fluorum, contra legem, contra tenorem Magnae Chartae*) he was put to death; more examples of this kinde might be fhewed."

Magna Charta did not abrogate the maritime law or law of the sea by virtue of which discipline has been maintained from time immemorial over the men who go down to the sea in ships. That is to say, the Great Charter required that the trial of all crimes committed within the geographical limits of England should be by the "law of the land." This did not disturb the ancient jurisdiction

of the maritime courts to try such offenses by the "law of the sea." (Vol. III, Coke on Littleton (Thomas's Ed.), pp. 335, 336; Blackstone's Com., Book I, pp. 418-421, Book III, 106-109; Broadfoot's Case, Foster's Rep. 154; *Le Caun v. Eden*, Doug. 572.)

In Vol. 3, Coke 1st Int. (Thomas Edition), pp. 335, 336, it is said:

"\* \* \* *altum mare* is out of the jurisdiction of the common law, and within the jurisdiction of the lord admiral, whose jurisdiction is very ancient, and long before the reign of Edward the Third, as some have supposed, as may appear by the laws of Oleron (so-called, for that they were made by King Richard the First, when he was there), that there had been an admirall time out of mind, and by many other ancient records in the reigns of Henry the Third, Edward the First, and Edward the Second is most manifest.

This great officer in the Saxon language is called *Aen mere al.* (i. e.) over all the sea, *praefectis marijs. sive classis archithalassas.* and in ancient time the office of the admiralty was called *custodia Marinac Anglæ, or Maritime Anglæ.*"

In Vol. VII, Ency. Britt., p. 348, it is shown that a different rule applied to those men from that applicable to men in the army. It is there said:

"The administration of the barbarous naval law of England was long entrusted to the discretion of commanders acting under instructions from the lord high admiral, who was supreme over the royal and merchant navy. It was the leaders of the Long Parliament

who first secured something like a regular tribunal by passing in 645 an ordinance and articles concerning martial law for the government of the navy. Under this ordinance Blake, Monk and Penn issued instructions for holding general and ship courts-martial with written records, the one for captains and commanders, the other for subordinate officers and men. Of the latter, the mate, gunner and boatswain were members, but the admirals reserved a control over the more serious sentences."

See also Blackstone's *Com.*, Book I, pp. 418, 421.

There is no provision in the Constitution of the United States prohibiting the Government from conscripting the citizens and hence it was held in *Arter v. U. S.*, 245 U. S. 366, that they could be conscripted for foreign service. But the right to try them when conscripted as soldiers within the geographical limits of the United States in any other way than by a jury for crime committed against the United States is expressly prohibited by the Constitution. The right of a soldier in this respect at common law is shown by the following (Vol. 3, Macaulay's *History of England*, pp. 30 to 34):

"The common law gave the sovereign no power to control his troops. \* \* \* Even James did not venture to inflict death by sentence of a court-martial. The deserter was treated as an ordinary felon; was tried at the assizes by a petty jury on a bill found by a grand jury, and was at liberty to avail himself of any technical flaw which might be discovered in the indictment."

In the Petition of Right assented to by Charles I, in 1627, it is said:

"Whereas also by authority of Parliament in the five and twentieth year of the reign of King Edward III, it is declared and enacted that no man should be fore-judged of life or limb against the form of the Great Charter and the law of the land; and by the said Great Charter and other laws and statutes of this your realm, no man ought to be adjudged to death but by the laws established in this, your realm, either by the customs of the same realm, or by acts of Parliament; and whereas no offender of what kind soever is exempted from the proceeding to be used, and punishments to be inflicted by the laws and statutes of this, your realm; nevertheless of late times divers commissions under your majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against *such soldiers* \* \* \* as should commit any murder, robbery, felony, mutiny or other outrage or misdemeanor whatsoever, and by such summary course and order as is agreeable to martial law, and as used in armies in time of war, to proceed to the trial and condemnation of such offender, and then to cause to be executed and put to death according to the law martial:

By pretext whereof some of your majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved it, by the same law and statutes also they might, and by no other ought to have been judged and executed: And also sundry

grievous offenders by color thereof claiming exemption, have escaped the punishments due to them by the laws and statutes of this, your realm, by reason that divers of your officers and ministers of justice have unjustly refused or forborn to proceed against such offenders according to the same laws and statutes, upon pretense that the said offenders were punishable only by martial law, and by authority of such commissions aforesaid; which commission and all other of like nature are wholly and directly contrary to the said laws and statutes of this, your realm."

In the first English Mutiny Act, which became a law in the year 1689, 82 years after the first settlement at Jamestown, it is said:

"Whereas, the raising or keeping of a Standing Army within this Kingdome in time of Peace unless it be with Consent of Parlyament is against Law. And whereas it is judged necessary by Their Majestys and this present Parliament That during the time of Danger several of the Forces which are now on foot should be continued and others raised for the safety of the Kingdome for the Common Defense of the Protestant Religion and for the reducing of Ireland.

And whereas *no man may be forejudged of life or limb or subjected to any kind of punishment by martial law or in any other manner than by the judgment of his peers and according to the known and established laws of this realm.* Yet nevertheless, it being requisite for retaining such forces as are or shall be raised during the exigence of affairs in their duty and exact discipline be observed. And that soldiers who shall *mutiny or stir up*

sedition or shall *desert* their majestys service be brought to a more exemplary and speedy punishment than the usual forms of law will allow."

\* \* \* \* \*

"Provided always that nothing in this Act contained shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law.

Provided always that this act or anything therein contained shall not extend or be any ways construed to extend to or concern any the militia forces of this Kingdome."

It thus appears that the Petition of Right and the Mutiny Act constituted a solemn recognition by the King, Lords and Commons that at common law no man could be deprived of his life or liberty for a crime or offense committed against the state unless he was tried by his peers in an ordinary court of law. Blackstone finds much occasion for regret in the Mutiny Act. He complains that it was the introduction of an alien principle into the English system of laws. (Book I, pp. 406 to 416.) He says: "The laws therefore and constitution of these kingdoms know no such state as that of a perpetual standing soldier bred up to no other profession." (Book I, p. 84.) He laments the fact that the Mutiny Act introduced a system of slavery into England, thus (Book I, p. 416):

"How much therefore is it to be regretted that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen! For Sir Edward Coke will inform us (e) that it is one of the

genuine marks of servitude to have the law, which is our rule of action, either concealed or precarious: '*misera est servitus ubi jus est vagum aut incognitum.*' Nor is this state of servitude quite consistent with the maxims of sound policy observed by other free nations. For the greater the general liberty is which any state enjoys, the more cautious has it usually been in introducing slavery in any particular order or profession. These men, as Baron Montesquieu observes, (f) seeing the liberty which others possess, and which they themselves are excluded from, are apt (*like eunuchs in the eastern seraglios*) to live in a state of perpetual envy and hatred towards the rest of the community, and indulge a malignant pleasure in contributing to destroy those privileges to which they can never be admitted. Hence have many free states, by departing from this rule, been endangered by the revolt of their slaves; while in absolute and despotic governments, where no real liberty exists and consequently no invidious comparisons can be formed, such incidents are extremely rare. Two precautions are, therefore, to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all; or, 2, if it be already introduced, not to entrust those slaves with arms, who will then find themselves an overmatch for the freemen. *Much less ought the soldiery to be an exception to the people in general, and the only state of servitude in the nation.*"

The majority of those who adopted the Constitution were members of the Continental Congress. Of the fifty-six members of the Constitutional

Convention, thirty-nine had appended their signatures to that Declaration; one had heard Blackstone inveigh in his Oxford lectures against that Mutiny Act which reduced that "set of men whose bravery had so often preserved the liberties of their country \* \* \* to a state of servitude in the midst of a nation of freemen" (I Bla., p. 416); four had read those lectures while studying at the Inner Temple; twenty-six others were lawyers who had studied Blackstone in this country; seven had signed that Declaration of Independence which justified their rebellion against the existing government in the opinion of mankind, because of the introduction of "standing armies," the making "the military independent of the civil power," "quartering troops" and "protecting them by mock trials" for murders; ten had served as state judges, of whom four were still upon the bench; one had been a judge of the old Federal Court of Appeals in cases of prize and capture; seven had served as judges in cases of disputed boundary lines between the states; eight had helped to frame the constitutions of their respective states; three had aided in the codification and revision of their own state laws; eight had been governors of states; five had been members of the Annapolis Convention; one had been a member of the Albany Convention; and three were universally regarded as oracles upon public or international law. All of them—whether lawyers or civilians—had witnessed the practical operation of our institutions as colonies under the crown and under the Articles of Confederation, and had enjoyed the best opportunities of observing the merits and defects of both systems. Such

were the men Edmund Burke described in his speech on Conciliation when he stated:

Six capital sources of what he called "a fierce spirit of liberty." First, "The people of the colonies" were "descendants of Englishmen." They were therefore "not only devoted to liberty, but to liberty according to English ideas, and on English principles." Second, "Their governments were popular in a high degree" in all "the popular representative is the most weighty." Third, "Religion, always a principle of energy, in this new people" was "in no way worn out or impaired. The Colonists left England when this spirit was high, and in the emigrants was the highest of all." Fourth, because even in the Slave States "freedom and privilege," those who were "free are by far the most proud and jealous of their freedom." Fifth, education. "In no country in the world is the law so general a study. \* \* \* I learn," said he, "that they have sold nearly as many of Blackstone's Commentaries in America as in England. \* \* \* They augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze." Sixth, remoteness of situation. "Three thousand miles of ocean lies between you and them. No contrivance can prevent the effect of this distance in weakening your government. Seas roll, and months pass between the order and the execution."

The men who wrote the words, "The trial of all crimes, except in cases of impeachment, shall be by jury"; "No person \* \* \* shall be deprived of life, liberty or property without due process of law," and "In all criminal prosecutions the accused

shall enjoy the right to a speedy and impartial trial by a jury," also wrote the Declaration of Rights of October 14, 1774, which proclaimed:

"That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of English Constitution, and the several charters or compacts, have the following rights:

\* \* \* \* \*

"That our ancestors, who first settled these colonies, *were at the time of their immigration from the mother country*, entitled to all the rights, liberties and immunities of free and natural born subjects within the realm of England. \* \* \* That by such immigration they by no means forfeited, surrendered or lost any of those rights, but they were, *and their descendants now are*, entitled to the exercise and enjoyment of all such of them as their local and other circumstances enable them to exercise and enjoy.

\* \* \* \* \*

*That the respective colonies are entitled to the common law of England and more especially to the great and estimable privilege of being tried by their peers of the vicinage according to the course of that law.*

That they are entitled to the benefit of such of the English statutes as existed *at the time of their colonization*, and which they have by experience respectively found to be applicable to their several local and other circumstances.

That these, his majesty's colonies, are likewise entitled to all the privileges and immunities granted and confirmed to them by royal charters, or secured by their several codes of provincial laws."

They also wrote that section of the first Articles of War in 1775, which *expressly denied jurisdiction to courts-martial over capital crimes committed by soldiers*, thus:

"L. All crimes, *not capital*, and all disorders and neglects, which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by general or regimental court-martial, according to the nature or degree of the offense, and by punished at their discretion."

They also wrote Article I of Section X of the revised articles adopted in 1776, as follows:

"Whenever an officer or soldier shall be accused of a capital crime, or of having used violence, or of having committed any offense against the persons or property of the good people of any of the American States such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made, or in behalf of the party or parties, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to the aiding or assist-

ing to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered."

The effect of this latter article was to expressly deny jurisdiction to military courts to try any soldier for a purely *civil crime* punishable by the known laws of the land and the combined effect of both articles was to altogether prevent a court-martial from trying a soldier for a *capital crime* even though it were prejudicial to good order and military discipline and came within the category of military offenses. This court has held that no military tribunal from the year 1775 to 1863 had power within the United States to punish for capital offense. It was not until the year 1863 (Act of March 3, 1863, Sec. 30, Stat. 736) that courts-martial were given power "in time of war, insurrection or rebellion" to punish for *capital crimes*. (*Caldwell v. Parker*, 40 S. C. 388, l. c. 389.) Thus:

"It is to be observed that by this section there was given to courts-martial, under the conditions mentioned, power to punish for capital crimes, *from which their authority had been from 1775 expressly excluded.*"

During the eighty-eight years between 1775 and 1863 the military tribunals of this country were *expressly denied power* to impose punishment for a capital crime. The statutes conferring jurisdiction on such tribunals to punish "all disorders and neglects \* \* \* to the prejudice of good order and military discipline" were enacted during the revo-

lution when war was flagrant and where in many instances the courts were closed. The country successfully prosecuted the war of the revolution; the war of 1812; the Mexican war, and the countless wars on the frontiers with the Indians which redeemed the Great West from savagery and burned it into powerful and opulent states of the American Commonwealth with armies in which no tribunal existed which had power to impose the death penalty on soldiers. During the civil war and Spanish wars and the incidental Philippine insurrection the Articles of 1863 controlled and these gave army tribunals to punish capital crimes only where the civil courts were closed. That statute "had no application to territory where the civil courts were open and in the undisturbed exercise of their jurisdiction." (*Coleman v. Tennessee*, 97 U. S. 509; *Caldwell v. Parker*, 40 S. C. 388, I. c. 390.)

In the light of the foregoing facts of legal and political history and in the light of the rule that "a constitution must be interpreted with reference to the common law and previously existing legislation (Black Interp. of Laws, 19) it is difficult to understand how a court professing to have any regard for the facts of history or for the well established rules of constitutional interpretation can hold that the men who wrote and adopted the constitution and inserted the guarantees of liberty therein intended to authorize any department of the government to confer power upon another to reduce the manhood of the nation "to a state of servitude amidst a nation of freemen" and to make soldiers "an exception to the people

in general and the only state of servitude in the nation." Especially is this so in the light of the decisions of this and other Federal courts holding that the variety of common law set forth in Blackstone's Commentaries is the variety which the framers of the constitution and the people who adopted it intended to preserve in that instrument (Knobt's case, 10 Ct. Cl. 397 Aff. 95 U. S. 14; *Schick v. U. S.*, 195 U. S. 69.) In the last cited case in determining the meaning of the provisions of the Constitution guaranteeing trial by jury, it is said:

20

"Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it."

In the light of the foregoing, how can any reasonable mind conclude that the colonists intended to give the Congress power to introduce a system of slavery into these United States? The Mutiny Act never was in force in the Colonies. It was a statute enacted *after* the establishment of the colonial governments and could not be effective in the Colonies unless they were especially named. Furthermore, it was not suited to their conditions. No standing army was ever maintained in the Colonies. One of the causes for rebellion was the attempt of the British King to maintain

standing armies and protect them by mock trials for murders committed on the inhabitants of the Colonies. In the Declaration of Independence it is said:

"He has kept among us in times of peace standing armies without the consent of our legislature.

He has affected to render the military independent of and superior to the civil power.

He has combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation.

For quartering large bodies of troops among us.

For protecting them by a mock trial from punishment for any murders which they should commit on the inhabitants of these states."

It is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. (*Gulf Ry. Co. v. Ellis*, 165 U. S. 150; *McKeister v. Sager*, 163 Ind. 671; *Butchers Union Co. v. Crescent City Co.*, 111 U. S., I. c. 762; *American Fed. of Labor*, 33 App. Cas. [D. C.] 83; *In Matter of Jacobs*, 98 N. Y. 98; *People v. Warden of City Prison*, 157 N. Y. 116.) It was to destroy the odious standing army and forever prevent its alien incidents and the laws by which it was governed from becoming part of the law of the United States that the colonists rose in arms. Can the court hold that the colonists must be held to have intended to give Congress power to subject the citizens of this country to a law

similar to that Mutiny Act which Blackstone so vigorously denounced and lamented, especially in the light of the fact that the Supreme Court has held that (*Schick v. U. S.*, 195 U. S., 1. c. 69) Blackstone's brand of common law is that incorporated in the Constitution? To so hold it must construe the Constitution as the Acts of the English Parliament are construed. That is to say, it must proceed on the theory of the English Constitution that absolute, despotic power must in the theory of all governments reside somewhere and that that power is here intrusted to Congress as it is there intrusted to Parliament. (*Holden v. James*, 11 Mass. 396.) But the English Parliament "is at once a legislative and constitutional convention" (*State v. Associated Press*, 159 Mo. 410), and its power is so transcendent that it cannot be cribbed, cabined or confined either for causes or persons within any bounds. (*Davis v. State*, 68 Ala. 58.) Not so the Congress.

As it was therefore the right of a citizen who rendered military service to his country at common law when charged with crime to be tried by jury, so that right is his today. The Ninth Amendment expressly commands that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." When, therefore, a court holds that Congress undertook to write another exception into the third clause of the second

section of Article III of the Constitution so as to make it read "The trial of all crimes, except in cases of impeachment, and except in cases arising in the land and naval forces, shall be by jury," it holds that Congress was transcending its power and was arrogating to itself the same power as the Parliament of England. But Congress has such power. Whenever a rule, whether it be evidence or substantive law, is embodied in the Constitution and thereby clothed with the dignity of a fundamental law it is binding on every department of the Government and neither Congress nor the Executive can change the rule after the same fashion as the British Parliament. (Emery's case, 107 Mass. 172; *Counselman v. Hitchcock*, 142 U. S. 547; *Weeks v. United States*, 232 U. S. 383.)

The claim that this question has been decided against this contention by the cases cited by respondents is not founded in fact. The question here raised *has never been directly presented to a United States court so far as we can determine*. Those cases have proceeded either upon the theory that the crime could be punished twice by the courts of the same government because, forsooth, it was an infraction of two laws civil and military (a theory now exploded by the Grafton decision) or on the theory that it was conceded by the parties that if the petitioner was actually in the land or naval forces the power of Congress was plenary. In no case has it been contended that Congress was without power to so legislate as to deprive a conscripted citizen, or, for that matter, a soldier of the regular army, of his right to



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# CARD2

a jury trial if he was actually a soldier at the time he was charged with the commission of a capital crime against the United States.

The citations from the manual of courts-martial and the War Department bulletins do not aid the court. To cite such authority is to violate the maxim that "a matter, the validity of which is in issue in legal proceedings, cannot be set up as a bar thereto." (Broom's Legal Maxims, 8th Ed., p. 133.) *Non potest adduci exceptio ejusdem rei cuius petitur dissolutio.* (Bac. Max. Reg. 2.) *Bernardiston v. Soame*, 6 St. Tr. 1094.

Consequently the cases cited by respondent do not aid the court in the solution of the question now before it, for

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, *but ought not to control the judgment in a subsequent suit when the very point is presented for decision.* The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." (*Cohens v. Virginia*, 6 Wheat 397.)

The words of David Dudley Field seem to be applicable to the issue here presented:

"I could not look into the pages of English law—I could not turn over the leaves of

English literature—I could not listen to the orators and statesmen of England, without remarking the uniform protest against usurpation, and the assertion of the undoubted right of every man, high or low, to be judged according to the known and general law, by a jury of his peers, before the judges of the land. And when I turned to the history, legal, political and literary, of my own country—my own undivided and forever indivisible country—I found the language of freedom intensified. Our fathers brought with them the liberties of Englishmen. Throughout the colonial history we find the Colonists clinging, with immovable tenacity, to trial by jury, Magna Charta, the principle of Representation, and the Petition of Right. They had won them in the Fatherland in many a high debate and on many a bloody field; and they defended them here against the emissaries of the crown of England and against the veteran troops of France. We, their children, thought we had super-added to the liberties of Englishmen the greater and better guarded liberties of Americans.' (Brewer's Orations, Vol. 6, p. 2154.)

If Congress has the absolute power contended for, then it has a right to enact a law *prohibiting* the trial of a soldier for any crime by any court civil or military. Suppose Congress should be composed of men who subscribe to Napoleon's idea that "the worse the man, the better the soldier; if soldiers be not corrupt, they ought to be made so." Is it not probable that such a law would be passed by such men? Would such a law be constitutional? Respondent will hardly contend

that it would be. Yet, if the power of legislation over the subject matter be plenary, as respondent contends, such a law would be constitutional on the ground that it would make for the efficiency of the land forces.

Randolph's Committee Draft contained a legislative power "to enact Articles of War." This was changed to "make rules for the government of the land and naval forces." (Vol. 8, Am. Stat. 159.) The Massachusetts, New Hampshire, Virginia and North Carolina conventions recommended amendments to the Constitution which would have deprived persons in the land and naval forces not only of the right to be indicted by a grand jury, but in addition thereto of the right to a trial by a jury. The significance of the change from those recommendations shown in the Fifth Amendment is apparent. By that change such persons are not entitled to be indicted by a grand jury, but they are entitled to be tried by a jury. In *Shick v. United States*, 195 U. S. 65, l. c. 69, 70, a similar change was made in the provision of the original Constitution requiring that all crimes shall be tried by a jury. Said the court: "The significance of this change cannot be misunderstood." It follows that the change was made so as to preserve the right of trial by a jury to soldiers as it had existed from time immemorial according to the laws and customs that had existed in England.

In *Ex parte Reed*, 100 U. S. 13, the Supreme Court says that the courts-martial established by Congress for punishment of offenses in the navy is the successor of the old Court of Chivalry.

That court had only such jurisdiction as the common law did not recognize. (Blackstone Com., Bk. 1, p. 84.) It thus appears that the articles of war have created a tribunal and subjected the citizens, swept into the army by the draft law, to a jurisdiction which is not only foreign to our Constitution and unacknowledged by our laws, but was foreign to the Constitution and unacknowledged by the laws of England. It is like the Court of Star Chamber and as secret and arbitrary in its processes. All the analogies demonstrate that Congress in enacting Section 1342, R. S. U. S., if it means what respondent contends, enacted a law which was not only *unnecessary*, but *improper*, for the government and regulation of the land forces mustered according to the provisions of the Selective Service Act, while within the geographical limits of the states of the Union when the courts were open. It is significant that the second clause of Section 3 of Article 4 of the Constitution, giving Congress power to dispose of and make all needful rules and regulations respecting the territory belonging to the United States, has been held not to authorize Congress by legislation to deprive the inhabitants of such territories of the benefit of the constitutional right of trial by a jury. (*Thompson v. Utah*, 170 U. S. 355, 1 Pet. 545, 141 U. S. 180.) If in passing upon that subject matter the Supreme Court was justified in holding that Congress had no plenary power over the inhabitants of such territory with respect to depriving them of the right of trial by jury when charged with crime, by the same token it ought to be justified in similarly ruling on the

question here presented. A territorial court is not a reservoir of the judicial power mentioned in the Constitution of the United States. (*McAllister v. U. S.*, 141 U. S. 174.) Neither is a court-martial. (*Kurtz v. Moffet*, 115 U. S. 487.) Yet it has been held that a citizen tried in one court is entitled to a jury trial such as the Constitution contemplates. If this be true in one case, why not in the other? "The propriety of a law in the constitutional sense must always be determined by the nature of the powers on which it is founded." (Hamilton, *Federalist*, No. 33.) That is to say, even though the end sought to be attained be legitimate, yet Congress is not authorized to enact a law to accomplish such end merely because it is legitimate or because it makes the government stronger. (*Legal Tender Cases*, 12 Wall 543.)

Suppose the Fifth Amendment had never been adopted, what would the law have been? It would have been that set out in Clause 3, Section 2, Article III, of the Constitution. That is to say: "The *trial* of all crimes except in cases of impeachment shall be by jury." Manifestly under that provision, cases in the land forces came under the same rule at least with reference to the mode of accusation. This for the reason that it was found necessary to exclude cases arising in the land and naval forces from the benefit of that part of the Fifth Amendment requiring indictments by grand juries. And as it has been held (*Grafton v. U. S.*, 206 U. S. 333) that the protection of the other provisions of that amendment can be invoked by soldiers, it follows that they can invoke every constitutional provision that a

citizen can invoke save that from which they have been expressly excepted. If the power given to Congress to make laws *necessary and proper* to give effect to the rules it might make for the government of the land forces of its own force denied the right of a person in the land forces not to be held to answer for a capital or infamous crime without indictment or presentment of a grand jury, why was such a provision in the Fifth Amendment necessary? The answer is that the power given to make laws *necessary and proper* to give effect to the rules for the government and regulation of the land and naval forces as construed by the *people themselves* at the time did not give Congress plenary power to subject soldiers to accusation or trial *except in the same manner and form as every other citizen*. The construction placed on the Constitution by the people who adopted it is binding on this court. (*Ex parte Bain*, 121 U. S. 1.) The Fifth Amendment was adopted to prevent trials for infamous crimes upon information merely such as had been pursued in England (*Hurtado v. California*, 110 U. S. 516) and as now practiced with reference to misdemeanors by the United States (*Schick v. U. S.*, 195 U. S. 65.)

The exception of "cases arising in the land and naval forces" from the provision concerning the *mode of accusation* was a recognition that otherwise such cases were not excepted by the provision giving Congress power to make rules (in such cases) for regulating and governing the forces from the rule of law applicable to every other citizen. (*Gibbons v. Ogden*, 9 Wheat 438;

*Brown v. Maryland*, 12 Wheat 438.) In the latter case it is said: "The exception of a particular thing from the general words proves that *in the opinion of the law-giver* the thing excepted would be within the general clause had the exception not been made." Whatever may be said of the rule of contemporaneous construction by those charged with the *execution of a law* that rule must give way to contemporaneous construction by those who *made the law*. And those who *made the law* (that is, the people who adopted the Constitution) by adopting the Fifth Amendment demonstrated that the original Constitution did *not give Congress plenary power* over the method of putting soldiers upon trial for their lives. The question then arises, what is the extent of the exception contained in the words "except in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger"? It is a rule that the "exceptions from a power mark its extent," (*Gibbons v. Ogden*, 9 Wheat 191) and also a rule that "where no exception is made in terms, none will be made by mere implication or construction." (*Rhode Island v. Massachusetts*, 12 Pet. 722; *Cohen v. Virginia*, 6 Wheat 378.) It is a maxim of interpretation that "an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted. *Exceptio Probat regulam de veribus non exceptis.*" (*Bend v. Hoyt*, 13 Pet. 271.) Had the people intended to except the *mode of trial* as well as the *mode of accusation* from the operation of the Constitution would they not have said so? Had they intended another ex-

ception why did they not write it? It is evident that they would have done so if they had any such intention. *In re Bauman*, 96 Fed. 948, was a case where the court was asked to imply an exception into the law in addition to that already there. Said the court:

"If another exception had been intended, it would have been expressed along with that which was significantly declared."

In the solution of constitutional questions the same rules of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power (*Adams v. Storey*, 1 Fed. Cas. 66; *Rhode Island v. Mass.*, 12 Pet. 722). The rule that an exception will not be written into a statute when it would have "been easy for the law making power to say so," (*Ry. v. Grant*, 98 U. S. 689; *National Bank v. Matthews*, 98 U. S. 627; *U. S. v. Koch*, 40 Fed. 252; *In re Drake*, 114 Fed. 232; *Austin v. U. S.*, 155 U. S. 432), applies to the construction of a constitutional provision.

The clause in the Fifth Amendment requiring an indictment, except in cases arising in the land and naval forces, concerns a matter of mere procedure (*Hurtado v. California*, 110 U. S. 516; *Duncan v. Mo.*, 152 U. S. 377; *State v. Thompson*, 141 Mo. 408; *State v. Kyle*, 166 Mo. 287; *Hodson v. Vermont*, 168 U. S. 262; *State v. Jones*, 168 Mo. 398), and a change in the law after the commission of a crime authorizing the state to require the accused to answer for same upon an

information rather than upon an *indictment* is not *ex post facto*. (*Duncan v. Mo.*, 152 U. S. 377; *State v. Thompson*, 141 Mo. 408; *State v. Kyle*, 166 Mo. 287.) The common law did not require a presentment or indictment in all cases where the rights of a subject were involved as a condition precedent to requiring him to answer for a capital or infamous crime. (*Hurtado v. California*, 110 U. S. 516.) The opinion of the court in the Hurtado case discloses that Magna Charta did not require a presentment or indictment by a grand jury to be found before a subject could be put upon his trial for a crime. It appears from that opinion that the substantial right protected by the phrase "due process of law" in the Fifth Amendment to the Constitution and by the kindred phrase "law of the land" in Magna Charta referred to the *trial only*, and not to the manner in which the charge upon which he was tried was formulated or sworn to. Thus:

"It is the *forensic trial*, under a broad and general law, operating equally upon every member of our community, which the words, 'by the law of the land,' in Magna Charta, and in every subsequent declaration of rights which has borrowed its phraseology, make essential to the safety of the citizen, securing thereby both his liberty and his property."

The court sets out the complete amendment on page 534 of the opinion and then in a few terse phrases applying the rule that no words in a Constitution will be deemed superfluous, demonstrates that the clause concerning indictments is

not included in the clause forbidding deprivations without due process of law, thus:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself. (It then immediately adds): 'Nor be deprived of life, liberty, or property, without due process of law.'

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex termini* the institution and procedure of a grand jury in any case."

In the light of the foregoing principles it is singular that the insertion of a provision concerning *procedure* in the Fifth Amendment to the constitution should have been construed by Congress as justifying it in enacting a law by which it undertook to deprive millions of the citizens of this country of their substantial rights under the constitution. The only decision by a court of the United States in which this subject has received

"expressly excluded" by a law passed by the Continental Congress in force when the Constitution became effective. The decisions, with one accord, hold that it is the rights which were secured to the subjects by the *common law* and not those denied by the *statute* law of England which were intended to be secured by the constitutional provision. Magna Charta, the Bill of Rights, and the petition of right merely constituted a recognition of rights which had theretofore existed at and been secured by the *common law*. The English Mutiny Act was a statute in derogation of the rights of the Englishman at common law. There is no decision by the Supreme Court of the United States holding that the common law rights preserved in the Constitution with reference to jury trial have been modified by any English statute or by any American War Emergency Statute enacted in derogation of the common law. If the statement of the Supreme Court concerning the constitutional guaranty of the right to jury trial, to-wit: "That the provision is to be interpreted in the light of the principles which, at *common law*, determine whether *the accused in a given class of cases* was entitled to be tried by a jury" (*Callan v. Wilson*, 127 U. S. 540, l. c. 549) means anything, then it follows that the provision cannot be interpreted in the light of the statutes which in the year 1774 determined whether or not an *English soldier* was entitled to a jury trial in a *capital case*, but rather in the light of the American statutes then in force expressly recognizing such right in an American soldier. The interpretation contended for would destroy every con-

stitutional right now enjoyed by both soldier and civilian and would in fact destroy the constitutional guaranties. In 12 C. J. 710, it is said:

"The bills of rights inserted in the American constitutions contain a declaration of general principles as a basis of government, copied from Magna Charta and the English Bill of Rights of 1689. These bills are regarded as parts of the constitutions in which they are recited, and are to be construed with other constitutional provisions. But in view of their origin and long use, they cannot be regarded as introducing new matters or prescribing new conditions. Their purpose is to preserve ancient principles rather than to establish modern principles."

The Articles of War and the Mutiny Act represented *modern* and were antagonistic to *ancient* principles. Furthermore, the Articles of War of 1774 and thereafter, in England, to and including the year 1803 were not statutes enacted<sup>1</sup> by parliament but were merely rules promulgated by the King and posted over the garrison gates and the doors of the soldiers' barracks as a chief of police nowadays promulgates his orders for the direction of his subordinates. Those Articles of War thus promulgated by George III at a time when his troops were about to pillage and plunder the colonists were in direct violation of the provisions of the Mutiny Act of 1689, which contained the following provisos:

"Provided always that nothing in this Act contained shall extend or be construed to

exempt any officer or soldier whatsoever from the ordinary process of law."

It is a singular rule of construction which would attribute to the forefathers the intent to incorporate a power in the Constitution which was merely a lawless exercise of a supposed prerogative exercised in direct violation of Magna Charta, the Petition of Right, the Common Law and the Mutiny Act. Respondent claims that the Crown always exercised the right to make rules for the government and regulation of the land and naval forces which would warrant the infliction of penalties not extending to loss of life or limb and that the petition of right, the Bill of Rights and the Mutiny Act recognized this right on the part of the Crown as lawful. We find, however, an express recital to the contrary in the Mutiny Act where it is said:

"And whereas noe Man may be forejudged of Life or Limbs *or subject to any kinde of punishment by Martial Law or in any other manner than by the Judgment of his Peeres and according to the knowne and Established Laws of this Realme.*"

Respondent cites a British author named Samuel as authority for his contention that at the common law soldiers were not entitled to be tried by a jury. That is to say, he contends that the statements of Coke, Hale, Blackstone, Macaulay, Green and other jurists and historians are unworthy of credit on this question because Mr. Samuel writes something to the contrary in a work which he en-

titles "British Military Law." This contention justifies us in saying that Mr. Samuel's book is not a book of acknowledged authority except in so far as respondent regulates his conduct by it. We assert that no book of acknowledged authority can support respondents' contention. We quote from 4 Wall., page 76, and apply the remarks therein contained to this phase of respondent's argument, thus:

"When I say no book, I mean, of course, no book of acknowledged authority. I do not deny that hireling clergymen have often been found to dishonor the pulpit by trying to prove the divine right of kings and other rulers to govern as they please. Court sycophants and party hacks have many times written pamphlets, and perhaps large volumes, to show that those whom they serve should be allowed to work out their bloody will upon the people. No abuse of power is too flagrant to find its defenders."

So that there may be no question as to what the rule was at common law as to whether or not a soldier was entitled to be tried by his peers at a time when the courts were open, we quote from the reports of the trials in the cases of Strafford, 3 St. Tr. 1382, and Lancaster, 1 St. Tr. 39. The reports of those cases show that the King, Lords and Commons solemnly decided that it was a violation of the rights of the soldier at common law to try him by a court-martial and not by his peers when the courts were open. The Strafford case

was decided in 1641. The charge against Strafford contained the following allegation:

"That according to such his declarations and speeches, the Earl of Strafford did use and exercise a power above, and against, and to the subversion of the said fundamental laws and established government of the said realm of Ireland; extending such his power to the goods, freeholds, inheritances, liberties, and lives of his majesty's subjects of the said realm; and namely, the said Earl of Strafford, the 12th day of December, 1635, *in the time of full peace*, did in the said realm of Ireland give, and procure to be given, against the Lord Mountnorris (then and yet a peer of the said realm of Ireland, and then Vice-Treasurer and Receiver-General of the realm of Ireland, and Treasurer at War, and one of the Principal Secretaries of State, and Keeper of the Privy-Signet of the said kingdom), *a Sentence of Death by a Council of War called together by the said Earl of Strafford*, without any warrant of authority of law, or offence deserving any such punishment. And he the said Earl did also at Dublin, within the said realm of Ireland, in the month of March, in the 14th year of his majesty's reign, without any legal or due proceedings or trial, give, and cause to be given, a Sentence of Death against one another of his majesty's subjects, whose name is yet unknown; and caused him to be put to death in execution of the same Sentence."

The answer to this charge on the part of the defendant was:

"The Deputies and Generals of the Army have always executed martial law, which is

necessary there; and the Army, and the members thereof, have been long time governed by printed Orders, according to which, divers, by sentence of the council of war, have formerly been put to death, as well in the time of peace as war. The Lord Mountnorris *being a captain of a company in the Army, for mutinous words* against the said Earl, general of that army, and upon two of those ancient Orders, was proceeded against by a Council of War, being the principal officers of the army, about twenty in number, and by them, upon clear Evidence, sentenced to death."

The foregoing were the written pleadings. At the trial the managers of the impeachment are reported to have charged and given evidence concerning the above quoted charge thus:

"Against the lives of the king's subjects, both in the Case of the Lord Mountnorris, and also of another of the king's subjects, both of whom he had sentenced to death by Martial Law, contrary to all law, and to the manifest subversion of the privileges of subjects, Magna Charta, and the Petition of Right.

To the Lord Mountnorris's Case he replied:

'1. That though that Sentence had been unjustly given and rigorously prosecuted against him, yet the greatest crime that he could be charged withal, would but amount to manslaughter, or felony at the most. 2. That he hoped, though this were true, to obtain a pardon from his gracious master the king's majesty, as well as Conway and sir Jacob Astley had lately done, for exercising martial law in the northern army.'

Then he replied to all the parts of the Charge, which were four:

1. That he had exercised Martial Law in time of peace.

To this he answered, '1. That all armies have been, and must be, governed ever by martial law. 2. That there is a standing Army in Ireland, and therefore the case is all one in time of peace or war; and that the army might be undone if they should not use Martial Law, but were to expect remedy for the settling of a mutiny, or assurance of obedience, from the common law. 3. That it had ever been the practice of the Deputies, particularly of Wilmot, Falkland, Chichester, yea Cork himself; and therefore was no new thing brought in by him. This he proved, both by the production of the military Ordinances, and by divers witnesses who knew Sentences given in that kind by them. 4. That he had a particular Warrant in his Commission for this power. 5. That in the Lord Mountnorris's Case, he was commanded to exercise the same by the king's particular Letter: both which he caused to be read.'"

The contention of Strafford that he was justified as general of the army, beyond the geographical boundaries of England and therefore entitled by the law martial to try soldiers in his army in time of peace for mutiny by court-martial was answered by Mr. St. John, the king's solicitor, who demonstrated that the common law of England had been extended to Ireland by King John and afterwards by King Henry III by Act of Parliament held in England as appears by the patent rolls of the Thirtieth Henry III (3 Stat. Tr., l. c. 1501). It was therefore held that the soldiers were entitled to be tried by jury in the courts of the common law

and that Strafford in erecting a military tribunal within the king's dominion in time of peace and trying the king's soldiers by a military court, was guilty of treason and should be attainted (3 Stat. Tr., l. c. 1518). The Bill of Attainder recited that Strafford was guilty of endeavoring to subvert the ancient and fundamental laws and government of his majesty's realms of England and Ireland and to introduce an arbitrary and tyrannical government against law in the said kingdoms and for exercising a tyrannous and exorbitant power over and against the liberties of the said kingdom and the liberties of estates and lives of his majesty's subjects. Strafford was found guilty of more than murder in convening a court-martial, as the respondent Baker has done, and trying a soldier in a country to which the common law had been extended by an English statute and carried by the English colonists to Ireland in that early day. That decision as to what the common law was on the question here involved has always been recognized as the law of England by every historian, jurist and court worthy of the name by which the subject has been discussed since that time.

In the report of Lancaster's case, 1 St. Tr. 39, it appears that Lancaster was tried in the year 1322, before a court-martial in time of peace and at a place where and when the courts were open. Five years thereafter, the sentence and attainder incident to the sentence were reversed in the first parliament of Edward III for the reason that the King through his military court imposed sentence without having arraigned Lancaster as the law required before a tribunal composed of his peers

as required by the Great Charter of the liberties of England. The Lancaster case was decided in the year 1327, when every English peer was an English soldier because he held his lands in consideration of the rendition of military services. Lancaster therefore was a soldier. On page 46 of the report the reason for the reversal is thus given:

"—and so, without arraignment and answer, the said Thomas erroneously and against the law of the land, in time of peace, was sentenced to death; by reason whereof, because it is notorious and manifest that the whole time in which it was charged against the said Earl, that he committed the aforesaid offenses and crimes in the aforesaid record and proceeding contained, and also the time when he was taken, and when the said lord the king's father, etc., caused it to be recorded that he was guilty, and when he was sentenced to death, was time of peace; in particular because throughout the whole time aforesaid, the chancery and other places of the courts of the lord the king were open, and in them law was done to every one as it used to be done; \* \* \* the aforesaid lord the king's father, etc., ought not, in such time of peace, to have caused such record to be made against the said Earl, nor to have sentenced him to death, without arraignment and answer: Also, he says, that there is error in this, that whereas the aforesaid earl Thomas was one of the peers and great men of this kingdom, and in the Great Charter of the Liberties of England it is contained, that no free-man shall be taken, imprisoned, or disseised of his freehold or franchise, or his free customs, or outlawed,

or banished, or in any manner destroyed, nor shall the lord the king, by himself or others, proceed against him, but by the lawful judgment of his peers, or by the law of the land, the earl Thomas was by the record of the lord the king as aforesaid, in time of peace, erroneously sentenced to death without arraignment or answer, or the lawful judgment of his peers, against the law, etc., and against the tenor of the aforesaid Great Charter."

We think that these two decisions rendered by the highest court in England and cited by the Supreme Court of the United States with approval in the Milligan case demonstrates that at the common law a soldier charged with crime against his country was entitled to be tried by his peers when the courts were open. They also demonstrate that the statements contained in the histories of every reputable English historian to the effect that the soldier and civilian were similarly liable to be tried before the civil courts by their peers to the exclusion of military courts, rests upon a solid foundation and that the work of Mr. Samuels, cited by respondent, is unworthy of consideration in the light of those decisions and histories. The law as laid down in these decisions is expressly followed by the trial court in *Ex Parte Henderson*, 11 Fed. Cases, No. 6349, where it is said:

"—the common law of England knew nothing of courts-martial and made no distinction in time of peace between a soldier and any other subject. A soldier, therefore, by knocking down his colonel incurred only the ordinary penalties of assault and battery, and by refus-

ing to obey orders, by sleeping on guard, or by deserting his colors incurred no penalty at all."

The claim that the forefathers were accustomed to the trial of soldiers by courts-martial without juries because George III promulgated certain Articles of War for the government of the English standing army, even if well founded, does not warrant the conclusion that the provisions in the Constitution guaranteeing the right to jury trials could not be invoked by soldiers. This for the reason that those provisions are "to be interpreted in the light of the principles which at common law determine whether the accused in a given class of cases was entitled to be tried by a jury" (*Callan v. Wilson*, 127 U. S. 540, i. e. 549). Furthermore, to reach that conclusion the court would be compelled to ignore the prohibition contained in the Articles of 1775, noted in *Caldwell v. Parker*, *supra*.

The point that the dual nature of our governments operates to make the states of the Union foreign countries because the criminal jurisdiction of the Federal Courts is restricted, is a rather strained contention in view of the fact that a soldier charged with crime is entitled to have his cause removed to the Federal Court and hence, soldiers can be tried for all crimes committed within the geographical limits of the states of the Union in the Federal Courts (Art. War 117; *Tenn. v. Davis*, 100 U. S. 257). Respondent contends that the concession of petitioners that naval courts-martial have jurisdiction over persons in the naval

forces is tantamount to a concession that such courts have jurisdiction over men in the land forces for the reason that the constitutional provisions concerning the making of rules and concerning the mode of accusation of persons for capital or infamous crimes refer to land and naval forces in the same lines of the Constitution places such persons on the same basis. We think this suggestion is answered by the consideration that the Constitution is operative only within the geographical limits of the states of the Union of its own force without legislation extending it. (Ross Case, 140 U. S. 453; *Dorr v. U. S.*, 195 U. S. 138.)

It is also answered by the consideration that this court has ruled that the rights of the "men of the sea" must be held to be rights such as were recognized in ancient days in England, and that the "men of the land" may invoke the protection of the Constitution in cases where the seaman is without protection.

This is merely the application of the principle of the common law enunciated by Coke (Inst. 11, p. 50) concerning the phrase "law of the land":

"(*Per legem terrae.*) i. *Per legem Angliae,* and hereupon all commissions are grounded, wherein is this clause, *facturi quod ad iustitiam pertinet secundum legem, et consuetudinem Angliae, &c.* And it is not said, *legem et consuetudinem regis Angliae,* lest it might be thought to bind the king only, nor *populi Angliae,* lest it might be thought to bind them only, but that the law might extend to all, it is said *per legem terrae, i. Angliae.*

These decisions of the Supreme Court warrant the conclusion that the land forces are to be governed in accordance with the methods followed at common law and the naval forces as they were governed by the naval law from time immemorial.

The very phrase "Articles of War," borrowed as it has been from England, shows that the power, if any, vested in the Congress to make Articles of War for the government of soldiers contemplates a time of war. If we were to supply or substitute the definition of the word "war" laid down in the Lancaster, Strafford and Milligan cases and by Coke and the other authors referred to, then the phrase would read "Articles of a Time When The Courts Are Closed." The King, at the common law, did have authority to make Articles of War to govern the soldiers and the armies only when war was flagrant. He also had authority to make rules for the government and regulation of his guards, but he had no authority when the courts were open to punish them for violations of those rules in any case in which they were entitled to be tried on the charge by a jury at common law. This is the sort of power which was vested in the Congress by the clause giving it power to make rules for the government and regulation of the land and naval forces. It will be noted that the Constitution says "make." It omits to provide for power to "enforce" the rules so made by the infliction of such penalties as the commander of the forces may think proper. If any clause of the Constitution could be held to have given Congress power to provide a method of punishment for crime

apart from the method applicable to the average citizen it is the clause granting power to define and *punish* felonies committed on the high seas and against the law of nations. Yet Congress has never undertaken to provide for the punishment of such felonies when the culprits are brought to the United States other than by the ordinary courts.

We think that under all the authorities presented by us that all men within the geographical limits of the states of the Union are entitled to be tried by a jury when charged with an infamous crime and that they may be tried by a tribunal of which a jury is not a constituent part when the crime is merely a misdemeanor (*Shick v. U. S.*, 195 U. S. 95), and that Congress has only power to make rules for the government and regulation of the land and naval forces subject to the constitutional guaranties (*Grafton v. U. S.*, *supra*).

In concluding this phase of the matter we again call attention to the fact that a court does not perform its constitutional duty if it pronounces the exercise of a power as lawful merely because of its exertion in practice since the beginning of the government. In *Ex parte United States*, 242 U. S. 27, the court devotes the fourth subdivision of the opinion to a consideration of the legality of a long continued practice on the part of the courts in suspending the execution of a sentence. Said the court:

"—it cannot be denied that in both the state and Federal Courts, over a very long period of time, the power here asserted has been exercised, often with the express, and constantly

with the tacit, approval of the administrative officers of the state and Federal Governments, and has also been tacitly recognized by the inaction of the legislative department during the long time the practice has prevailed, to such an extent that the authority claimed has in practice become a part of the administration of criminal law, both State and Federal, not subject to be now questioned or overthrown because of mere doubts of the theoretical accuracy of the conceptions on which it is founded.

\* \* \* \* \*

Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things, amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. The fact that it is said in argument that many persons, exceeding two thousand, are now at large who otherwise would be imprisoned as the result of the exertion of the power in the past, and that misery and anguish and miscarriage of justice may come to many innocent persons by now declaring the practice illegal presents a grave situation. But *we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future.*"

If the air of England was "too pure for a slave to breathe in" in Mansfield's day (Sommersett's

case, 20 St. Tr. 1), should the same not be said of the atmosphere within the geographical limits of the states of the Union? As Mansfield did not hesitate to disregard the *practice* which had hitherto obtained in England in applying the law, neither should this court hesitate. We think the language in that case applicable here:

"The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its forces long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say that this case is allowed or approved by the law of England; and therefore the black must be discharged."

The service of a soldier is the service of a free-man (*Arver v. U. S.*, 245 U. S. 366); his subjection to a system of punishment not proportioned to offenses he may commit and by a power not expressly warranted by the Constitution on the whim of his commander is subjection to a condition of slavery (Coke, Inst. 4, 332; Blackstone, Bk. 1, p. 416).

### III.

**The express recognition in the first Articles of War adopted by the Continental Congress of the right of a soldier charged with a capital crime, during time of war, to a trial by jury, and the ex-**

ecutive, legislative and judicial recognition of that right during all the wars in which this country was engaged until 1863, was merely a recognition of the right in that respect enjoyed by soldiers at common law, and the rule that the provisions of the Constitution concerning the right to trial by jury will be interpreted with reference to the common law and previously existing legislation in connection with the rule that a practical interpretation of a law by all the departments of the Government for a long series of years demonstrates that the Constitution itself expressly preserves a soldier's right to be tried by a jury when charged with a capital crime, and that Congress under the guise of making rules for the government and regulation of the land forces can never take it away.

When we consider that the Continental Congress in the year 1774 adopted the Declaration of Rights declaring "that our ancestors who *first settled these colonies* were at the time of their emigration from the mother country entitled to all the rights, liberty and immunities of free and natural born subjects within the realm of England," and that when the colonies were first settled no law had been enacted in England giving a military tribunal power to try a soldier for a capital crime either in peace or war, and that the Mutiny Act had not yet been enacted by the English Parliament, that in the foregoing Declaration of Rights it was further declared "that by such emigration they by no means forfeited, surrendered or lost any of these rights \* \* \* that the respective colonies are entitled to the Common Law of Eng-

land, and more especially to the great and estimable privilege of being tried by their peers of the vicinage, according to the course of that law, and that said Congress in the year 1775, in adopting the first Articles of War, establishing "the generic power of courts-martial" (*Caldwell v. Parker*, 251 U. S. —), expressly denied the power of courts-martial to punish soldiers for capital crimes, either in peace or war, and that in practice for 12 years before and 76 years after the Constitution was adopted no military tribunal within the geographical limits of the revolting colonies or of the states of the Union ever lawfully undertook to try a soldier for a capital crime, either in peace or war (*Caldwell v. Parker*, 251 U. S. —), the conclusion is irresistible under all the rules of constitutional interpretation that no person within the geographical limits of the United States, be he soldier or civilian, alien or citizen, immigrant or native, can ever be deprived of his life by the executive power under legal forms while the courts are open unless it be by virtue of a verdict of a jury of his peers. The crimes made punishable by the 92nd Article of War are capital crimes. (*Motes v. U. S.*, 178 U. S. 458).

## IV.

**The words "but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace," prohibited courts-martial from trying petitioners for the reason that on the 29th day of July, 1918,**

**the courts were open in the State and District of Kansas and within the geographical limits of the States of the Union and the District of Columbia and hence it was a time of peace within the meaning of the 92d Article of War.**

The fact that Congress did not use the words "United States" instead of the words "geographical limits of the States of the Union and the District of Columbia" is significant. The words "United States" would cover the territory included within the "geographical limits of the States of the Union and the District of Columbia" and exclude Alaska and the Island Possessions. The use of thirteen words instead of two indicates that Congress had a purpose in their use. Had the words been "no person shall be tried by court-martial for murder committed within the United States in time of peace," then if war existed anywhere in the United States a court-martial would have jurisdiction because it would not be a time of peace within the United States. But if war existed in one of the States of the Union only, it would be a "time of peace" in all the other states of the Union and in the District of Columbia. Would the statute under such circumstances authorize a trial by court-martial in such other states or District of Columbia?

We submit that it would not in the light of the rules of grammatical and statutory construction. If we supply the ellipsis this will be apparent. Thus:

"—no person shall be tried by court-martial for murder \* \* \* committed within the

geographical limits of the states of the Union and the District of Columbia in time of peace (within the geographical limits of the states of the Union and the District of Columbia)."

Why designate the geographical limits of the states of the Union and of the District of Columbia severally rather than the geographical limits of the entire nation? Manifestly the *geographical limits* of the District of Columbia were not mentioned without some purpose. But if those geographical limits are to figure in determining the jurisdictional question, then the phrase "time of peace" must have something to do with the limits of the District of Columbia and of each state.

The phrase "time of peace" refers to a time of peace in some state or country. It cannot mean that if a war exists somewhere on earth that such war may deprive the courts of jurisdiction. The question is: Where must the war exist which destroys jurisdiction, and vests jurisdiction to take the life of an American citizen? That question is answered by the decisions of the courts defining the phrase "time of peace."

In *Ex parte Milligan*, 4 Wall, l. c. 128, the Supreme Court of the United States quoted with approval the declaration of the Parliament of England in reversing the attainder of the Earl of Lancaster in the first year of the reign of Edward the Third, defining the phrase "time of peace" thus:

"—in the time of peace no man ought to be adjudged to death for treason or any other offense without being arraigned and held to

answer and that regularly *when the King's courts are open it is a time of peace in judgment of law.*"

Lancaster was a soldier in the service of his King and country and was guilty of rebellion but notwithstanding his trial and conviction by court-martial was solemnly denounced by the great court of the realm as illegal. The chief justice, concurring in the Milligan case, said:

"Where peace exists, the laws of peace must prevail."

It thus appears that a time of peace exists *where* peace exists and that for jurisdictional purposes, peace exists *where* the courts are open. In Prize Cases, 67 U. S. 635, l. c. 666, it is said:

"War has been well defined to be, 'That state in which a nation prosecutes its right by force'. \* \* \* The true test of its existence as found in the writing of the sages of the common law, may be thus summarily stated: '*When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open, civil war exists.*'"

In Coke's Com. on Litt. Lib. iii, chap 7, s. c. 412, p. 249, 6, as quoted in Law, Wheat. Int. Law, p. 525, note, it is said:

"When the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be

*time of peace.* So, when by invasion, insurrection, rebellions, or such like, the peaceable course of justice is disturbed and stopped *so as the courts be*, as it were, shut up, *et silent inter leges arma*, then it is said to be time of war."

The phrase "time of peace" used in the 92d Article of War is thus shown to have acquired a settled meaning at common law and that said meaning has been adopted by the Supreme Court. Under the rules of statutory construction, Congress must be held to have intended to use the phrase for the same purpose and in the same sense as it had been understood at common law. Endlich, in his Interpretation of the Statutes, Section 3, says:

"Where a term used in a statute has acquired at common law a settled meaning, that is ordinarily the technical meaning which is to be given to it in construing the statute. \* \* \* The reason in all such cases for adopting the technical common law sense of words is 'because they have a definite meaning which is supposed to have been understood by those who were, or ought to have been learned in the law.' And the rule applies equally in State and Federal courts as to the meaning of state legislatures and of Congress. \* \* \* Accordingly the meaning of murder, robbery, in an act of Congress, is to be determined by the common law and so the word forfeiture with relation to the time when the same should take effect as to personality or realty when the statute leaves the intention of Congress in this particular undefined."

In *Kepner v. United States*, 195 U. S., l. c. 124, it is said:

"It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. The *Abbotsford*, 98 U. S. 440."

It thus appears that the concrete meaning of the phrase "time of peace" without reference to other rule of statutory construction shows that a court-martial is powerless to try a soldier for either of the offenses mentioned in the 92d Article of War in this country where the courts are open. In every instance where the courts can administer justice according to law, a court-martial has no jurisdiction to try a soldier any more than it has to try a civilian in any state of the Union or the District of Columbia.

## V.

The law recognizes a distinction between domestic and foreign war and the question as to whether or not a state or time of war existed in so far as personal rights are involved is to be determined by the records and judges of the courts of justice and not by the records, officers or acts of any other department of the Government.

Whenever the rights of the subject with reference to those tenures which are known as "military" were involved, the courts at common law did not look to the King or Parliament or to

any acts of either King or Parliament to determine what those rights were. In other words, whenever the rights of a subject in his military capacity were involved within the geographical limits of England, those rights were determined by the courts. It was held by those courts in the reign of Edward III, that a tenant of the King who owned a knight's fee and consequently was liable to render forty days service to the King in his wars in each year could not be held in legal contemplation to have begun to discharge his obligation until he *entered the foreign country with which the King was at war.* It was held that the war did not begin until then and that until the King and his host reached the foreign country they "were said to go towards the war." It was contemplated that persons rendering military service to the King should be "mustered," that is, appear before the King's Commissioners in the open field, well armed and *trained.* Consequently the preparation period did not in legal contemplation amount to service in war.

According to the common law, if any one seized by any means whatsoever of the inheritance of a corporeal hereditament dies, whereby the same descends to his heir, in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against his heir by this summary method, but is driven to his action to gain a legal seisin of the estate. And this because the heir comes to the estate by act of law, not by his own act; the law therefore protects his title, and will not suffer his

departed from their captain within the term contrary to the form of that statute, it was felony; because now that statute is of no force; because that ancient and excellent form of military course is altogether antiquated; but later statutes have provided for that mischief.

To muster is to make a show of soldiers well armed and trained before the King's Commissioners in the open field: *Ubi se ostendes praeludunt praelio.* In Latin it is, *censere, seu lustrare exercitum.*"

\* \* \* \* \*

"So as hereby it also appeareth concerning the point in law demurred in judgment in the seventh of Edward the Third, here mentioned by our author, the law accounteth unto the foreign nation; for *then the war beginneth,* and *till he come there, he and his host are said to go towards the war,* and no military service is to be done till the King and his host come hither."

Judge Cadwalader in *The Parkhill*, 18 Fed. Cas., p. 1187, 10755a, said:

"In the opinion of Grotius, Demosthenes had, in the case of the Thracian Cheronese, correctly stated the rule of public law to be that, wherever judicial remedies are not enforceable by a government against its opponents, the proper mode of restoring its authority is war. *Gro. De Jure*, B 23. The opinion of Grotius has given to this case, in which the views of Demosthenes prevailed at Athens, the force of a modern precedent. \* \* \* —an English statesman, in a parliamentary debate upon a judicial question said, in the year 1696: 'You must provide for the government, and when you cannot do it by

force of law, then armies must do it when courts are shut up.' Speech of Harley, in Fenwick's case 13 Stat. Tr. 706. \* \* \*

Force which acts upon the physical powers of man, and judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to our constitution, except as far as it shall be sanctioned by the latter. But let the latter be obstructed in its progress by an opposition which it cannot overcome or put by, and the resort must be to the former, or government is no more."

\* \* \* \* \*

"The rule of the common law is that, when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and the hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land. The converse is also regularly true; so that when the courts of a government are open it is ordinarily a time of peace. \* \* \* The marshal of the United States, in order to keep the peace of his judicial district, and enable him to execute the process of the courts, may arm himself and his deputies, and may also call in the aid of a warlike force. Y. B. 3, Hen. VII, pl. 1; 5 Coke 72a; Br. Riots, pl. 2; Dall., c. 95; 8 Watts & S., 191; 5 C. & P., 254, 282. When he cannot, by such means, keep the peace in his district, and the courts in it no longer can direct the process to his, a state of war exists."

It thus appears that the judges of the olden time reached the same conclusion as the district judge in *Ex parte Mickell*, Fed. 817, that is, that though the country be engaged in a *foreign* war, yet that it is not a time of war in the home country where the soldiers are being trained for the fight. This is but recognition of a fact. A prize-fighter cannot be said to be fighting while preparing and before he gets in the ring. Hence he could not properly say that the time of preparation was a time of fighting. What is true of the individual is true of the nation.

## VI.

With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no intention to take from them the jurisdiction which they had always exercised with respect to soldiers and citizens should be ascribed to Congress in the absence of clear and direct language to that effect, hence the prohibition denying jurisdiction to courts-martial to try soldiers for murder or rape in time of peace prevents such courts from trying such persons except at a time when martial law is in force and applicable alike to soldier and citizen.

The prohibition in the 92d Article of War against trying *any person* by courts-martial for murder committed within the states of the Union in time of peace *applies equally to soldier and*

*citizen.* It will be noted that the Twelfth Article of War provides:

"General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles *and any other person who by the law of war is subject to military tribunals.*"

Article 92 provides:

"Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but *no person* shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace."

Jurisdiction is granted to try soldiers and civilians by Article 12 but this jurisdiction cannot be exercised as to "any person" within the limits of the states of the Union in time of peace, according to Article 92. The words "any person" necessarily include soldiers. One section grants jurisdiction as to persons subject to military law and to those not so subject. They are both placed on a plane of parity in the same sentence granting jurisdiction. Does it not necessarily follow that the words "no person" in the clause of the article *limiting jurisdiction* includes "any person subject to military law" and "any other person who by the law of war, etc.,," included in the clause of the article *granting jurisdiction*. Both sections must be read together especially in the light of the fact that the old code was changed because it was

"unscientific in its arrangement." (Int. Manual for C. M., X.) The old 58th Article granted the jurisdiction, set out its limitations and prescribed the penalty for murder. The new 12th and 92d Articles grant the jurisdiction, define its limitations and prescribe the penalty. The jurisdiction granted includes "the capital offenses of murder and rape when committed in time of peace at places outside the geographical limits of the United States and the District of Columbia" (Introduction Manual for C. M., XI) and all persons who by the law of war are subject to trial by military tribunals regardless of the limits. But "no person" within those limits is subject to this jurisdiction "in time of peace." Are the words "no person" not sufficiently impersonal and all-embracing to include persons subject to the socalled "military law"? And if they are, do they not also include civilians? Before "persons subject to military law" can be held to be subject to a different rule from civilians in time of peace within the limits mentioned the court must write an exception into the proviso denying jurisdiction in time of peace.

So, after all, the distinctions, so-called, between military and martial law, are immaterial. The test, therefore, by which to determine whether or not the court-martial had jurisdiction is: Could petitioners, had they been ordinary civilians, be tried for murder by court-martial for the crime? Unless the question can be answered affirmatively they must be discharged. This is not a contest concerning the words "military law" and "martial law," so far as petitioners are involved. Bacon's

animadversion on the controversies of the schoolmen who frittered away their time in empty discussion concerning the words in which men's ideas were clothed to the total exclusion of the facts of nature or of the subject matter presented would apply here. The variety of adjective used by military men or schoolmen to denote the substance of a thing does not change that substance. When a man is done to death contrary to law the fact that he lost his life by virtue of an excuse couched in the somewhat paradoxical phrases "military law" or "martial law" does not change the fact that those spurious adjectives do not excuse the violation of the right not to be done to death without due process of law. But we have not confused the so-called varieties of law. In support of their assertion, respondent cites the works of Davis and Birkhimer. These were officers in the army prior to the publication of the present manual and according to their ideas, military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the laws or usages of war." But it seems that since their works were published military jurisdiction has grown, for in the Manual of Courts-Martial (page 1, Clause 2), we find that the present manuals of courts-martial asserts that "Military jurisdiction is of *four* kinds." It thus appears that military jurisdiction has become infected with the progressive spirit of the age and that, while it is limited to *two* kinds during the administration of one Secretary of War, it may grow to *four* kinds during that of another by mere force of his will and without

legislative sanction. One of the kinds of military jurisdiction is thus defined in the Manual, page 2:

"Martial law applied to the army: that is military power extending in time of war, insurrection, or rebellions over persons in the military service, etc."

The introduction to the Manual for Courts-Martial, page xiii, thus defines "Military Law":

"—in distinguishing military from civil law, we say that military law is the law relating to, and administered by, military courts."

It would seem that a court administering martial law is a "military court." Where, then, is the material difference herein? The individual who can point it out

"—could well divide a hair twixt south and southwest side."

It is a distinction without a difference in so far as the question now before the court is involved. The phrase "Martial Law" in the English Mutiny Act and the Petition of Right denoted the same idea as the modern phrase "Military Law."

Congress has always been reluctant to take away the jurisdiction of the civil courts in cases involving the lives of civilians or soldiers for murder. In the case of *Coleman v. Tennessee*, 97 U. S. 509, l. c 514, in discussing this very question of liability on the part of a soldier for murder under the old 58th Article of War to be tried by court-martial alone, the court, holding

that because the murder was committed in Tennessee where actual war existed and the courts were closed, exclusive jurisdiction was vested in a court-martial, said:

"Previous to its enactment, the offenses designated were punishable by the state courts, and persons in the military service who committed them were delivered over to those courts for trial; and it contains no words indicating an intention on the part of Congress to take from them the jurisdiction in this respect which they had always exercised. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, *no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.*"

The words in the 92d Article of War "as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace" are new and in addition to the provisions of the old 58th Article of War, and take away the concurrent jurisdiction which the court in *Coleman v. Tennessee*, 97 U. S. 509, held (while indulging in dicta) was vested in civil and military courts.

Therefore the rule by which the right of a court-martial or military commission to try a civilian is determined, applies in the instant case. That rule has been properly pointed out by the Supreme Court of the United States and other

courts. In *Ex parte Milligan*, 4 Wall. l. c. 127, it is said:

"If, in foreign invasions or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late rebellion it could have been enforced in Virginia, where the national authority was overthrown and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.' "

In *Griffin v. Wilcox*, 21 Indiana 370, l. c. 378, it is said:

"When the courts of justice be open and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, *it is said to be*

*time of peace.* So when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts be as it were shut up, *et silent inter leges arma*, then it is said to be time of war." Coke upon Littleton, as quoted in Law, Wheat. Int. Law. p. 525.

\* \* \* \* \*

Where the laws are, or may be, executed without the interference of the President by his military, he has no right thus to interfere.

\* \* \* \* \*

"The war power of the President then, may be stated thus: He has a right to govern, through his military officers \* \* \* when and where the civil power of the United States is suspended by force. In all other times and places the civil excludes \* \* \* government by the war power. In all parts of the country, where the courts are open, and the civil power is not expelled by force the Constitution and laws rule. \* \* \* If, in such parts of the country, men have not perpetrated acts constituting in law, crimes, their arrest, trial, and punishment by military courts, is but a mode of applying lynch law; is, in short, mob violence. This is so, unless the old English tory doctrine of government is secretly included in our constitution. That doctrine, as expressed by Filmer, is that 'a man is bound to obey the King's command against law: nay, in some case, against divine laws.' May's Const. Hist. Vol. 2, p. 21 note. Such was the maxim, the constitution, indeed, of Imperial Rome. 'Quod principi placuit legis habet vigorem.' What pleases the Prince, has the vigor of law. Coop. Just. Inst. p. 9; 1 Black, Comm. p. 74."

In Hale's History of the Common Law, Rungtington's Edition, London, 1820, pages 42, 43, it is said:

"That the exercises of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the King's courts are open for all persons to receive justice according to the laws of the land."

But respondent contends that the question as to whether a state of peace or war exists is to be determined by the war making department of the Government and that since Congress by resolution recognized the existence of war with the German Empire in April, 1917, that this resolution of its own force changed what was a state of peace into a state of war in the State and District of Kansas. He cites certain cases in support of this contention but those cases involved merely the question of the relationship of belligerents or statutes of limitations or kindred questions. Of course in such cases the decision of the political department of the government as to whether or not a state of war exists is controlling. They involve questions wholly different from a case where the jurisdiction of a court to try a citizen for his life because of an act punishable by the ordinary laws of a country in the civil courts thereof is involved.

This court in the recent case of *Caldwell v. Parker*, 40 S. C. R. 388, in substance and effect, decided the questions which must result in the reversal of the judgment of the court below. In

that case the court reviewed all of the Articles of War with reference to capital crimes beginning with that adopted by the Continental Congress in 1775 to and including the present Articles. The conclusion drawn by the court was a denial of the contention of the Government in a brief filed *amicus curiae*. The Government there contended that the effect of the Articles of 1916 was to vest exclusive jurisdiction in courts-martial in time of war. This contention was denied by the court in an opinion which inferentially questioned the power of Congress to grant such power. Said the court:

"It cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted since the Articles of War originally adopted in 1775, as we have seen in the very midst of the war for independence, modified in 1776 to make certain the provisions of the civil power."

The court further denied the contention based upon the words "except in time of war" and the cognate words "in time of peace" which were found in Articles 74 and 92. Thus:

"Both these provisions took their origin in the Act of 1863 and were drawn from the terms of that Act as expressed in the revision of 1874. By its very terms, however, the Act of 1863 was wholly foreign to the destruction of state and the enlargement of military power here relied upon \* \* \* but the Act did not purport to increase the general power of courts-martial by defining new crimes or by bringing enumerated offenses in

As applied to the soldiers of our country this would be one of the genuine marks of slavery, for it is one of those marks "to have the law which is our rule of action either concealed or precarious" (1 Black 416).

## VII.

**The armistice between the Allied Powers and Germany of November 11, 1918, ended the war with Germany as a fact, and also ended the power, existence and jurisdiction of a tribunal which was called into being only by the actual existence of a state of actual war. The 92d Article of War in the nature of things must be transposed to read, 'No person shall be tried (in time of peace) by court-martial for murder,' etc. As the trial did not end until two weeks after the war ended, the sentence could not be promulgated by a moribund tribunal.**

It should be taken into consideration that *as a fact* the war was ended fourteen days before the trial ended by the Armistice of November 11, 1918 (*In re Egan*, 8 Fed. Cas. 367, the Prize case, 67 U. S. 35). The sentence of the court was not promulgated until February 9, 1920, more than fifteen months after the war ended. This, of itself, even if it be conceded that the court-martial had jurisdiction while war was raging in Germany, destroyed the power of the court-martial to proceed with the trial, for the 92d Article of War declares that "no person shall be tried by court-martial for murder \* \* \* committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

That is to say, "no person shall be tried by court-martial (in time of peace) for murder committed, etc." This transposition is justifiable for the reason that the only justification for the use of a military tribunal in such case is the state of war and when the war, which gave the tribunal life, ends the tribunal must necessarily die. The words "in time of peace" refer to all the precedent matters in the 92d Article, for it is a canon of construction that words in a statute prescribing a rule, standard or condition, according to which a citizen may be compelled to forfeit his life, apply to and control all the precedent matters in such statute. This was the rule which according to Coke (Inst. II., 45) the 29th Chapter of Magna Charta was construed. Thus:

"—for these words, *per legem terrae*, being towards the end of this chapter, do refer to all the precedent matters in this chapter."

Justice Nelson, who wrote the dissenting opinion in The Prize cases, when on circuit, discharged the petitioner in the case of *In re Egan*, 8 Fed. Cas. 367, after his trial on a charge of murder by a military commission. The crime was alleged to have been committed in South Carolina on September 24, 1865, nearly a year before the proclamation ending the war. Said the court:

"When a government or country is disorganized by war, and the courts of justice are broken up and dispersed, or disabled through the prevalence of disorder and anarchy, from exercising their functions, then

is an end of all law; and the military power becomes a necessity which is exercised under the form and according to the practice and usage of martial law. As has been said by a distinguished civilian when foreign invasion or civil war renders it impossible for the courts of law to sit or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them and to employ for that purpose the military, which is the only remaining force in the community; and while the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society; *but no longer*. This necessity must be shown affirmatively by the party assuming to exercise this extraordinary and irregular power over the life, liberty and property of the citizen whenever it is called in question. \* \* \* No necessity for the exercise of this anomalous power is shown. For aught that appears, the civil, local courts in the state of South Carolina were in the full exercise of their judicial functions as the time of the trial."

So, the only excuse which respondents can give for their extraordinary conduct in trying petitioners for murder is to affirmatively show that the civil, state and federal courts in Kansas were not functioning at the time of the trial.

For the purpose of jurisdiction, neither a formal declaration of war or proclamation of peace, nor its absence, is conclusive in determining the question. In *The Prize cases*, 67 U. S. 635, it is said:

"Whether the hostile party be a foreign invader or states organized in rebellion, it is

none the less a war, although the declaration of it be *unilateral*. \* \* \* It is not the less a war on that account for *war may exist without a declaration on either side*. It is so laid down by the best writers on the law of nations. \* \* \* The battles of Palo Alto and Resaca Da La Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized a state of war as existing by the act of the Republic of Mexico. \* \* \*

To the same effect is the decision in *Ford v. Surget*, 97 U. S. 594.

According to the definition cited by respondents, military law is the system of rules which governs the *army* in time of peace. Martial law is the system of rules which governs *all persons* in time of war. Respondent says he is operating under the system of rules applicable to a time of war which, by the very nature of the definitions on which he relies, would authorize the army officers to try civilians for murder committed in Kansas in July, 1918, if they are authorized to try soldiers for such a crime. How can respondent reconcile his conflicting contentions?

The legal definition of the phrases "time of peace" and "time of war" correspond with the ordinary meaning attached to those phrases. Bartol says, "Among arms, said the Roman author, laws are silent. Among arms, we may add the temples of prayer are voiceless." Burke says: "Laws are commanded to hold their tongues among arms, and tribunals fall to the ground with the peace they are no longer able to uphold."

It follows that in accordance with every definition it was a time of peace within the state and district of Kansas, not only on and after the 11th day of November, 1918, but on the 29th day of July, 1918, and that the court-martial was without jurisdiction.

### VIII.

The order detailing the General Court-Martial (Rec. 3) shows that two members of the detail were retired from the army and therefore not eligible to sit as members thereof. It also shows that three members were designated as United States guards, but does not disclose whether those guards were prison guards or penitentiary guards or coast guards, or whether they were or were not in the military service of the United States or in the marine corps, and that therefore the tribunal was not constituted as required by the 4th Article of War.

The detail for the court contained in Secretary Baker's order of October 19, 1918, shows that the first two members of the detail were Major Samuel A. Smoke, U. S. Army, retired, and Captain Henry M. Fales, U. S. Army, retired.

The order promulgated by the War Department on the 9th day of February, 1920, discloses that the sentences of death and of life imprisonment imposed upon the appellants were approved by the President of the United States, and in the first sentence of the order appears the following:

"Before a general court-martial convened at Fort Leavenworth, November 4, 1918, pur-

suant to special order No. 247, War Department, October 22, 1918, of which *Major Samuel A. Smoke, U. S. Army, retired, was President.* Major Walter Smith, Coast Artillery Corps, was Judge Advocate, and First Lieutenant Lewis A. Humason was Assistant Judge Advocate, were arraigned and tried."

It thus appears that the officer of the court-martial by whom the record was signed, to-wit, the president, was not competent to sit on the court-martial for the reason that he was retired from the army and was not an officer in the army as required by the Fourth Article of War. The Fourth Article of War provides that:

"All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on court-martial for the trial of any persons who may lawfully be brought before such courts for trial."

Subdivision A of Article One defines the word "officer" thus:

"The word officer shall be construed to refer to a commissioned officer."

Major Smoke was an officer within the definition quoted, but it appears from the face of the proceedings that he was not an officer in the military service of the United States as required by the Fourth Article.

Under a decision of the United States Court for the District of Kansas as outlined in an opinion filed November 28, 1919, in the cause of *In re David A. Henkes, habeas corpus*, this question was considered and discussed. The court in that opinion referred to Clause 9, Section 2, Subdivision B, page 7 of the Manual for Courts-Martial, which provides as follows:

"A retired officer may be assigned with his consent to active duty upon courts-martial in time of peace (Act of April 23, 1904, 33 Stat., 264), and if employed on active duty in time of war in the discretion of the President (Sec. 24, Act of June 3, 1916, 39 Stat., 183) he is eligible for court-martial duty. At other times he is not available for such duty except that when placed in command of a post under the Act of August 29, 1916 (39 Stat., 627), or when assigned to recruiting duty he may act as summary court-martial when he is the only officer present. (See pars. 26 and 27.)

It does not appear from the face of the record that Major Samuel A. Smoke was with his consent assigned to active duty upon courts-martial in time of peace, nor does it appear that he was employed on active duty before being assigned as a member of the detail for the court which convicted the appellants. In passing upon the question here involved, the court there said:

"If the record made at the trial does not on its face disclose the members of the court here at the time it was convened 'employed in active duty in the discretion of the President

under Act of June 3, 1916,' it follows on the face of the record made the court was not composed as by law provided."

In that case the Government sought by evidence *aliunde* to show the fact that the members of the court, although retired officers, were at the time in the discretion of the President on active duty. Denying this contention the court said:

"As it is a record of a court of special and limited jurisdiction it seems to be conclusively settled its jurisdiction must affirmatively appear on the face of the record and in the absence of such affirmative showing its judgment is a nullity."

In *Demming v. McClaughry*, 113 Fed. 639, Judge Sanborn for the Circuit Court of Appeals, states the rule applicable to courts-martial as follows:

"A court-martial is a court of limited jurisdiction. It is a creature of the statute. A temporary judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it. The articles of war specify the officers who are in power to convene these courts, the officers who may compose them and the persons and charges which they are empowered to try. It necessarily follows that the jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned by these indispensable prerequisites: (1) that it was convened by an officer empowered by the statutes to

call it; (2) that the officers whom he commanded to sit upon it were of those whom he was authorized by the articles of war to detail for that purpose; (3) that the court thus constituted was invested by the acts of Congress with the power to try the person and the offense charged; and (4) that its sentence was in accordance with the Revised Statutes. The absence of any of these indispensable conditions renders the judgment and sentence of a court-martial *coram non judice* and absolutely void because such a judgment and sentence is rendered without authority of law and without jurisdiction."

This same general rule was announced by the Supreme Court of the United States in *Runkle v. U. S.*, 122 U. S. 543, 546; *Gringen's Lessee v. Astor et. al.*, 2 How. 319; *Galpin v. Page*, Cyc. Vol. 11, Page 696.

## IX.

**The court-martial was not constituted as required by the 5th Article of War, for the reason that notwithstanding it was known of all men and is demonstrated by the records of the War Department that thirteen members could have been detailed without manifest injury to the service, yet only eight were detailed.**

The Fifth Article of War is as follows:

"General Courts-Martial may consist of any number of officers from five (5) to thirteen (13), inclusive, but they shall not consist of less than thirteen when that number can

be convened without manifest injury to the service."

The provision that a general court-martial shall not consist of less than thirteen (13) is a command by virtue of which the legislators sought to approximate the historical method of trial by jury, that is, twelve (12) jurors and a judge, believing that no man should be subject to trial for a felony except before a tribunal constituted at least with respect to numbers, as the ordinary tribunals in such cases were constituted. For this reason this section contains this express command coupled with the provision "when that number can be convened without manifest injury to the service." The question as to whether or not a greater number than eight (8) could have convened or been convened without inflicting a manifest injury to the military service is one which this court must determine. The form of recital in the order detailing or convening the court, that a greater number of officers cannot be assembled without manifest injury to the service, is necessarily contradicted by the physical facts shown in the records of the War Department of which this court can take judicial notice. There were in the months of October and November, 1918, more than two million soldiers in the army, completely officered. The city of Washington was swarming with army officers, and the judges of this court can recall that all the hotels and all the public buildings were filled with men wearing uniforms and shoulder straps.

These are also facts of which this court can take judicial notice for they are historical facts

which, in connection with the records of the War Department, absolutely contradict the recital made in an attempt to bring the order for the detail within the provisions of Article 5. But if the opinion in Williamson's case (1 Opinions, Atty. Genl. 296, l. c. 297) be worth anything, then the recital in the order detailing the court was not operative to deprive the appellants of their right to have a court-martial, which undertook to deprive them of their lives, of not less than thirteen (13).

In said opinion Attorney General Wirt said:

"This being a case, however, of life and death, I beg leave to recall to your recollection, sir, that, by the 64th Article of the Rules and Articles of War, it is required that general courts-martial shall not consist of less than thirteen, where that number can be convened *without manifest injury to the service*. The court in the case of Williamson having consisted of five commissioned officers only, was not a legal court of *thirteen* could have been convened without manifest injury to the service. The phrase, you will observe is not "where that number (thirteen) can be *conveniently convened*," but where they *can* be convened *at all*, not only without *probable* injury, but without *manifest* injury to the service. It is difficult to conceive an emergency in time of peace so pressing as to disable the general officer, who orders the court from convening thirteen commissioned officers on a trial of life and death, *without manifest injury to the service*. And if a smaller number act, without such manifest emergency, I repeat that they are not a lawful court, and an execution under their sen-

tence would be murder. With all the respect, therefore, which we ought to feel for our officers, I suggest it to you, sir, as a matter of legal propriety, that, in *every case of life and death at least*, the President ought to be satisfied of the *manifest injury* which the service would have sustained in convening a court of *thirteen*, before he gives his sanction to a sentence of death from a smaller number."

He emphasizes the seriousness of taking away the lives of men by an improperly constituted tribunal, calling attention to the fact that the phrase is not "where that number (thirteen) can be conveniently convened," but "when they can be convened at all," not only without probable injury, but without manifest injury to the service.

Webster's New International Dictionary thus defines manifest:

"Evident to the senses, especially to sight; apparent; distinctly perceived; hence, obvious to the understanding; evident to the mind; easily apprehensible; plain; not obscured or hidden. SNY.—Open, clear, apparent, visible, plain, unmistakable, indubitable, indisputable, evident, self-evident. *Manifest, obvious, patent, palpable* apply to that which is evident. That is *manifest* which is clearly evident as to arrest one's attention; that is *patent* which is open or unconcealed; that is *palpable* which is evident to (or as to) the senses."

It must appear to this court before it can hold that the tribunal was legally constituted, even if

discharge in a penitentiary. The Disciplinary Barracks is a penitentiary in fact, though not in name, where military convicts are kept with a view to reformation, but their "status" as members of the "land forces" or the "armies" is lost during the service of the sentence as discharged convicts. (Secs. 337 to 339, Manual of Courts-Martial, inclusive.)

Any person sentenced by court-martial may be sent to the Federal Penitentiary with civil convicts if the sentence be one year or more (Art. of War 42). As a matter of fact there are many military convicts in the Federal Penitentiary at Leavenworth, Kansas. Should one of those convicts in the Federal Penitentiary commit rape or murder in said penitentiary then, under the theory of respondent he could not be tried by a civil court but the warden would be under the necessity of writing to some army officer to appoint some of his subordinates to erect themselves into a court to try him for the murder. How could such convict be held to be in the land or naval forces? The absurdity of the contention is apparent. As convicts sentenced by courts-martial and those sentenced by the civil courts occupy the same status in fact, so they occupy the same status in legal contemplation. That is, neither class belongs to the "land forces" or the "armies of the United States."

The persons serving\* sentences adjudged by courts-martial contemplated by Clause "E" of the Second Article of War are those who *still remain in the military service* while so serving their sentences. It would, therefore, seem that the cases

of appellants are not "cases arising in the land or naval forces" and that as appellants were not members of the army of the United States on July 29th, 1918, they could not be tried by court-martial for a civil crime.

Section 8 of Article I of the Constitution grants power to Congress "to raise and support armies" and "to make rules for the government and regulation of the *land \* \* \* forces*." The Fifth Amendment requires that "no person shall be held to answer for a *capital \* \* \* crime* unless on a presentment by a grand jury, except in cases arising in the *land \* \* \* forces*."

It was by virtue of this authority that Congress made the rules by which petitioners were dishonorably discharged from the army by sentence of courts-martial. After sentence and its publication their status was settled. If they were not then in the army Congress could make no rule for regulating their conduct as members of the land forces. The fact that the sentences of discharge could have been set aside did not affect their status. The fact remains that those sentences *were not annulled* at the time of the alleged murder or trial. The petitioners could not be dishonorably *discharged* prisoners who *had been soldiers in the army* and at the same time *be in the army* on July 29th, 1918. Secretary of War Baker ordered the publication and distribution of War Department Document No. 560. At least, so the title page recites. This document is entitled, "A Manual for Courts-Martial." Section 38, Clause "E," page 21 of said manual contains the construction placed by said Secretary and the chief

law officers of the army on the effect of a dishonorable discharge by sentence of a court-martial, to-wit:

"A dishonorable discharge does not relate to any particular contract or term of enlistment; it is a discharge from the military service as a punishment—*a complete expulsion from the army*—and covers all unexpired enlistments. A soldier thus dishonorably discharged *can not* be made amenable for a desertion or other military offense committed under a prior enlistment except as provided in A. W. 94. Nor would a subsequent enlistment after such dishonorable discharge operate to revive the amenability of the soldier for such offenses."

The courts have thus construed the effect of a discharge (*U. S. v. Sweet*, 189 U. S. 471):

"In the military service the word 'discharge' is the word applied to an order ending the service of an officer at his own request; but in other connections it conveys the notion of a movement beginning with a superior, and more or less adverse to the object, as for instance, we speak of the discharge of a servant. Usually it is a slightly discrediting verb."

In *Williams v. U. S.*, 137 U. S. 113, it was held that:

"The term 'discharge' was used during the period of the Revolution to designate the dismissal from the continental service of troops, either individually or as organizations."

The words "all persons" in Clause "E" of the Second Article of War, where read in the light of the *subject matter* referred to in the enacting clause of the statute adopting the Articles of War, to-wit, for the government of the army and of the constitutional provision authorizing Congress to make rules for the regulation of the land forces necessarily means all persons *in* the army or land forces. Literally construed, those words would include a person who was never in the army or land forces but whom a court-martial arbitrarily and wrongfully sentenced. Endlich, in his work on Interpretation of Statutes, Secs. 86 and 90, says:

(86) "—it is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject matter in reference to which the words are used, finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject matter. While expressing truly enough all that the legislature intended, they frequently express more, in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute, without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be construed as particular if the intention be particular; that is, they must be understood as used in reference to the subject matter in the mind of the legislature, and strictly limited to it."

(90) "—the word 'persons' may be variously understood as meaning persons born in the Queen's Allegiance, or as including also all foreigners actually within the British dominions (a) or (the meaning in prize and commercial law) only persons domiciled in those dominions. (b) In an Act which provided for the recovery of wages by 'persons belonging to a ship,' this expression would obviously be confined to persons employed in its service on board; while in one which related to the salvage of 'persons belonging to the ship, it would as obviously include passengers as well as crew. (c) And the word 'crew' in a statute prohibiting any master or other officer of a vessel maliciously to imprison, etc., any of the crew, was held to include, not only the common seamen, but the subordinate officers, e. g., the first mate of the ship."

Again, Sec. 1342 is a *penal* statute. The Articles of War included in it provide for the infliction of greater and more penalties than the penal code of the United States. For to all crimes of which the non-military citizen can be guilty are superadded those which soldiers only can commit. And in view of the fact that the personnel of the arbitrary tribunal authorized to inflict those penalties on the common soldier are men who are not his peers or learned in the law but men who are to him the aristocrats and autocrats of the earth and bear the same relation to him that the master bears to his slave and whose watchwords and hobby are "Discipline," "Obedience," rather than "Justice" or "Right" and that the procedure conforms to no rule but the arbi-

trary will of the individuals constituting the tribunal, the section in question may be truly described as comprising the most oppressive and sanguinary code that has appeared in the statute books of any civilized nation since the days of Draco. Incorporated in it are all the pains and penalties which can be inflicted by civilized man upon his fellows. Hence it is a statute to which the rule of strict construction should be applied in its utmost rigor. In a leading case expounding the rule, which is as old as construction itself, that penal statutes must be construed strictly, Chief Justice Marshall said (*U. S. v. Wiltberger*, 5 Wheat., l. c. 96):

"The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation which it would be unsafe to consider as precedents forming a general rule for other cases."

Accordingly, it was held that an act of Congress punishing certain offenses committed on the

"high seas" could not be extended to an offense committed on the tidal waters of a navigable river of a foreign country.

The words "all persons under sentence adjudged by courts-martial" construed in the sense for which respondent contends would include not only persons *while serving sentences*, but also every person who had ever been sentenced by court-martial. This for the reason that a sentence of a court-martial carries with it the stigma and disabilities attached by law to conviction of a crime against the United States. In 19 Opp. Atty. Gen. 106, it is said:

"The crimes and misdemeanors forbidden by the Articles of War are offenses against the United States."

In 11 Opp. Atty. Gen. 19, it is said:

"While a judgment entered by the President approving the sentence of a court-martial dismissing an officer from the service is, after it has been executed, irrevocable, *he may remove the guilt of the dismissed officer by pardon.*"

It would, therefore, seem that every soldier who has been sentenced by court-martial remains *under the sentence* until its effect is removed by a pardon. He remains *under it* in the absence of such pardon during his life as completely as those soldiers who are now dead must until the end of time remain

"*Under the sod and the dew, waiting the judgment day.*"

Therefore, the word "under" cannot be held to be synonymous with the words "while serving." The true criterion by which to determine the meaning of Clause "E" is the Constitution. As the stream cannot rise higher than its source so the Congress can enact no valid law save that which the Constitution authorizes it to enact. Unless the petitioners were members of the land or naval forces on July 29, 1918, they were not subject to military law. The Secretary of War, in his Court-Martial Manual, describes a "general prisoner" as a "former soldier." Section 74, Clause "J," page 38 of the Court-Martial Manual, with note thereto attached, is as follows:

"In charging a general prisoner, with an offense, the form of the charge will not be changed but the specification will read as follows:

'In that General Prisoner A..... B.... did (here allege the offense in the language prescribed when it is committed by an officer or soldier.)'

It is not necessary to allege in the specification that the general prisoner *was formerly a soldier*, was tried by a general court-martial, and sentenced to dishonorable discharge and a term of confinement and that he committed the offense while serving such confinement. The words 'general prisoner' *necessarily import such facts*.

(Note.—*General prisoners* are persons sentenced to *dismissal or dishonorable discharge* and to terms of confinement at military posts or elsewhere.)"

The charge and the sentence by virtue of which appellants are confined by respondent designates appellants as "general prisoners."

This in connection with the admission at page 21 of the manual that the effect of a dishonorable discharge, is a complete expulsion from the army would seem to be conclusive. A person so sentenced can not be required to render military service. In *Ex parte Henderson*, 11 Fed. Cas. No. 6349, it is said:

"As \* \* \* the power of Congress is limited to making rules and regulations for the government of the land and naval forces and of the militia *in service*, it would seem to follow that these regulations cannot extend beyond what is *necessary* and *proper* for the governing of these forces as such *and in their military character*."

Petitioners were divested of their military character according to the rules set forth in the Manual of Courts-Martial published under the direction of the Secretary of War, when they lost the status of soldiers and became convicts. Congress had no power to subject such persons to trial by courts-martial. The cases cited by respondent upon examination will be found not to support their contentions either upon reason or authority. The construction sought to be placed upon this penal statute by respondent would not square with those applied by the Supreme Court. In *U. S. v. Locher*, 134 U. S. 624, it is said:

"—before a man can be punished his case must be plainly and unmistakably within the statute."

In the construction of penal statutes "every case must come not only within its letter, but within its spirit and purpose" (*U.S. v. Celluloid*, 82 Fed. 634). "Courts will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly within the mischief intended to be remedied." (*Ferret v. Atwill*, 1 Blatchf. 156.) Article of War 74 does not aid respondent. That article merely provides that a person who is *undergoing sentence* for a crime or offense punishable under these articles shall not be turned over to the civil authorities by the commanding officer. A rule regulating the *duties of an officer* involves totally different principles from those applicable to a law vesting jurisdiction in a court. The word "undergoing" in the 74th Article means something different from the word "under" in Clause "EE" of the 2nd Article. A man might be "under" the surface of the earth but it is hard to understand how he could be "undergoing" the surface of the earth. So a prisoner "under" sentence is in a different situation, from a prisoner "undergoing" sentence. To give effect to the contention of respondent this court must "presume" that Congress intended that word "under" should be synonymous with the words "while serving" or "while undergoing." That is to say, it must indulge in *presumptions* in favor of the jurisdiction of the court-martial. But the court in *Hamilton v. McClaughry*, 136 Fed. 445, holds that this cannot be done:

"It is settled law that courts-martial are courts of inferior and limited jurisdiction. No *presumptions* in favor of their exercise of

*jurisdiction are indulged.* To give effect to their judgments imposed it must be made to clearly and affirmatively appear that the court was legally constituted, that it had jurisdiction of the person and offense charged, and that its judgment is conformable to law. *Dynes v. Hoover*, 20 How. 625; *Runkle v. U. S.*, 122 U. S. 543. The judgments of such courts may be called in question in a collateral proceeding. *Ex Parte Watkins*, 3 Pet. 193; *Wise v. Withers*, 3 Cranch. 331. Again, so jealous are all English speaking nations of the liberty of their subjects, where a respondent in *habeas corpus* admits the restraint charged against him, he must justify by basing his right of restraint upon the exercise of some provision of positive law binding upon him, or the writ must issue or the person restrained have his liberty."

The provisions of positive law to which the respondents could point in the Craig and Wildman cases cited cannot be relied on here. There the jurisdiction was expressly given. Here it is not. But these cases were not decided by courts of last resort and the Craig decision rests on the Wildman opinion and neither case rests on facts like those admitted here. Judge Foster, in the Wildman case, had grave doubt of the propriety of his decision. He cited no authority and yet he would not decide whether or not Congress was exceeding its authority notwithstanding it appears from the opinion that he understood the question for decision to be whether or not Congress was justified in bringing "within the jurisdiction of the military courts several classes of persons hold-

ing certain relations to the army, although not really in the military service." He concludes his opinion by saying:

"The question is one of great importance, involving the validity of the act of Congress and the personal liberty of the individual, as also the discipline and management of the military prisons, and I hope this decision may be brought before some higher tribunal for further consideration."

Judge Thayer's opinion in the Craig case (70 Fed. 960), rests on Judge Foster's in the Wildman case, and also on the decision in *Re Bogart*, 2 Sawy. 396. The latter case was not in point for the court expressly decided that Bogart was "an officer in the navy" at the time of commission of the offense. But it does not appear in those cases as it does here that the legal effect of a dishonorable discharge is a "complete expulsion" from the army. The Secretary of War, on page 21 of his Court-Martial Manual, expressly declares that the effect of the sentence was to completely throw petitioners out of the land forces. How he can with any grace contend here that he did not mean what he wrote or what was written by his order into the manual is more than we can comprehend. Had Judges Thayer and Foster suck an express admission before them on the part of the respondents in those cases it is hardly probable that they would have held that such a discharge "cannot be held to have the effect of severing his connection with the army." Respondent herein cites the manual as binding authority of this Court. If it

mulgation of the sentence of the court-martial. From what has been hitherto submitted it appears that a dishonorable discharge imposes a dishonorable status and converts a soldier who becomes a general prisoner into a *former* soldier. It disables him from assisting his country to administer justice upon a public enemy or render any sort of military duty. In this respect the disability incident to a sentence of the variety in question is similar to the disability of incompetency which resulted at common law in preventing a convicted felon from assisting his country as a witness to administer justice in time of peace upon the person who violated its laws or who sought justice in its courts. This disqualification was an integral part of the sentence and became operative *immediately* upon the rendition of the sentence (*Huntington v. Attrill*, 126 U. S. 657; *Brown v. U. S.*, 233 Fed. 353; *Commonwealth v. Green*, 17 Mass., l. c. 547). There is an interesting discussion of this subject in the case of *State v. Grant*, 79 Mo. 113, where the court holds that the statute of Fifth Elizabeth imposing the disability of incompetency on a witness convicted of perjury was construed to be part of the punishment and sentence and that the same rule applied in this country with reference to disabilities imposed by statute. Said the court:

"The conclusion may rationally be drawn that under the statutory provision now being discussed the disabilities which that statute annexes to the commission of a certain offense form, where conviction follows prosecution, part and parcel of the conviction. And if

such disabilities do not form, in contemplation of law, part of the judgment of conviction—part of the punishment annexed to the crime—then the record of the judgment of conviction would afford no evidence that the disabilities denounced by the statute had been incurred.

\* \* \* \* \*

If the legislature can remit any portion of the sentence or judgment of a court of competent jurisdiction, then there is no obstacle to their remission of the whole sentence. The difference is only in degree and not in kind. I take it that when the statutes annex certain disabilities, the loss of certain civil rights, to the conviction of a crime, and a conviction of that crime thereafter occurs, that thereupon by force and operation of the law and of the judgment of conviction *the disabilities become welded to the crime, forming thereby an individual integer incapable of separation by any exertion of legislative power.*"

If the disability imposed by dishonorable discharge included in the sentence be an indivisible integer thereof, how can the execution be said to be postponed in view of the fact that the sentence is itself the only criterion by which to determine whether or not it has become operative? The respondents contend that a court-martial is a court which is supreme within its sphere, having competent jurisdiction with complete and adequate power to impose sentences for crime including in the sentence a dishonorable discharge. But they contend that after the sentence is promulgated and the soldier is degraded by being stripped of

his uniform and arrayed in the garb of a convict merely serving his sentence for crime against the United States that he is still a soldier *for the purpose of punishment but for no other purpose.* We still confess our inability to understand how "convicts" can be made amenable to a rule made for the government of "soldiers." Respondents claim that a power is vested somewhere to suspend the execution of a dishonorable discharge. This is a power which was never lawfully exercised by a common law court or by a court created by a law of Congress (*Ex parte United States*, 242 U. S. 27). If this be true it follows that the dishonorable discharge became fully effective when the sentence was promulgated and petitioners kicked out of the army and into a convict's cell and status.

Respondents rely upon the *obiter* remark of Chief Justice Fuller in *Carter v. McClaughry*, 183 U. S., l. c. 383, citing Section 1361, Rev. Stat., as supporting their contention that notwithstanding their admission that petitioners are discharged from the army and were so discharged their status as prisoners made them amenable to the Articles of War. It will be noted that the Chief Justice was answering the contention that Carter could not be tried after his discharge for an offense committed *before* his discharge and incidentally in supporting his declaration that the court-martial had jurisdiction he cited the *now repealed* Section 1361. From this it follows that respondents can find no comfort from this *obiter* remark based on a repealed statute. (Sec. 31 Opp. Atty. Gen.)

Congress has power to make rules which are necessary and proper only for the government of the soldiers in connection with their military duties and obligations. This is the construction placed upon the Articles of War in England and was the construction applied in the only opinion which we have found by a United States court in which the principles involved were discussed from their true standpoint. In *Ex Parte Henderson*, 11 Fed. Cas. No. 6349, it is said:

"As \* \* \* the power of Congress is limited to making rules and regulations for the government of the land and naval forces and of the militia in service, it would seem to follow that these regulations cannot extend beyond what is necessary and proper for the governing of these forces as such and in their military character. It is doubtful whether they can be subject to trial by court-martial for anything *but breaches of military duty*. Every soldier may be a citizen, and it would seem is as much entitled to trial by jury for any alleged crime, not committed by him in violation of his duty as a soldier, as any other person. It would be difficult to maintain that a law which subjected him to trial for such an offense committed in time of peace has ever been enacted in either England or America unless the act we are now considering be an exception. The Mutiny Act of England and our Articles of War are confined to the defining and providing for the punishment of *military offenses*. The purposes of these acts are so clearly and so accurately stated by Lord Loughborough in the case of *Grant v. Gould*, 2 H. Bl. 99, that I cannot forbear quoting from his opinion.

'The object of the Mutiny Act therefore is to create a court invested with authority to try those who are in the army, in all their different description of officers and soldiers, *and the object of the trial is limited to breaches of military duty.* Even by that extensive power granted by the legislature to his majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army.' When war is actually raging it is said that a mutineer or deserter might unquestionably be tried by a military tribunal, according to the customary law of war (Pendergast, p. 3), and perhaps at that time other offenses committed by any one in the camp and in the field may be punished under the same law by the commander; but the common law of England knew nothing of courts-martial, and made no distinction in time of peace between a soldier and any other subject. A soldier, therefore, by knocking down his colonel incurred only the ordinary penalties of assault and battery, and by refusing to obey orders, by sleeping on guard, or by deserting his colors incurred no penalty at all. (I Macaulay, History of England, p. 176; Pendergast, 15. The English people, with their omnipotent Parliament, have ever been exceedingly jealous of granting to courts-martial any jurisdiction over persons except those actually in their army or navy, and over them they have granted jurisdiction to punish only *military offenses—such jurisdiction only as seemed essential for their government as soldiers or sailors.*"

Mr. Justice Woodbury, in *Luther v. Borden et al.*, 7 How. 61, said:

"And as a further proof how rigidly the civil power requires the military to confine even the modified court-martial to the military, and to what are strictly military matters, it cannot, without liability to a private suit in the judicial tribunals, be exercised *on a soldier himself for a cause not military*, or over which the officer had no right to order him; as, for example, to attend school instruction, or pay an assessment towards it out of his wages. (4 Taunt., 67; 4 Maul. & Sel., 400; 2 H. Bl., 103, 537; 3 Cranch, 337; 7 Johns. (N. Y.), 96).

The prosecution of Governor Wall in England for causing, when he was in military command, a soldier to be seized and flogged so that he died, for an imputed offense not clearly military and by a pretended court-martial without a full trial, and executing Wall for the offense after a lapse of twenty years, illustrates how jealously the exercise of any martial power is watched in England, *though in the army itself and on its own members*. (See Annual Register for 1802, p. 569; 28 State Trials, p. 52, Howell's Ed.)."

## XI.

**The necessity of maintaining discipline in the army does not authorize Congress by virtue of its power to make rules for the Government of the land forces to enact laws providing that citizens may be deprived of their right to a trial by jury, even if the end sought to be accomplished by**

**such laws be legitimate. But no such assumed necessity exists.**

Notwithstanding the foregoing demonstrates that petitioners are entitled to be tried by jury respondent seeks to justify the trial of petitioners by court martial on the ground of *necessity*. That is to say, that those rights to the mode of trial for crime which have hitherto been regarded as the inalienable rights of all citizens incorporated in the constitution can be withheld from a citizen who is conscripted merely because he is a conscript who must be disciplined. He says it is lawful to deprive a citizen of the right to a jury trial for the sole reason that he attained an age and physical perfection which in the opinion of Congress enabled him to render military service.

The War Department records show that during the war about 22,000 men were convicted by general courts-martial and about 375,000 by the other varieties of court-martial. It thus appears that in the short space of nineteen months 400,000 young men of the nation have been ground in this military mill and stamped with the stain of "criminal!" Violations of the articles of war have been held to be crimes against the United States (19 Opp. Atty. Gen. 106), the guilt or stain of which convictions can be removed only by the pardon of the President (11 Opp. Atty. Gen. 19). And even a pardon is not efficacious for we note that the Judge Advocate General says "a sentence of a court-martial once executed cannot be set aside by the President himself" (Off. U. S. Bull. March 5, 1919, p. 16). We understand that

about 4,000,000 men were enrolled in the army during the war period. The Selective Service Act did not commence to yield its returns until the fall of 1917, so that the court-martial was engaged in its work for little more than one year. If such dire results followed from the operations of this tribunal in one year, what would the result have been had American citizens been wrought upon by it from the commencement of the world war? In practically one year this tribunal has branded every tenth patriot called to the colors as a criminal. As to the variety of "branding" inflicted, we quote from testimony given before the Military Committee of the Senate on February 13, 1919, as quoted in the Literary Digest for March 1, 1919:

"The sentences imposed for slight offenses by the courts-martial have shocked every sense of justice. They have reached the heights of injustice. The sentences in many instances bore no reasonable relationship to the offenses committed.

For forty years the Army has been cursed with red tape in its court-martial proceedings. Terrible injustices have been inflicted upon small offenders. The whole system is wrong."

Public opinion as reflected in the press and of lawyers who were attached to the Judge Advocate General's Department during the war period, demonstrates that the system by which justice is sought to be administered in the army amounts to a violation of the constitutional prohibitions against deprivation of life or liberty without due

process of law and against the infliction of cruel and unusual punishments. The following is quoted from the Literary Digest for April 12, 1919:

**"The Injustice of Army Justice.**

When a half-witted youth is sentenced by a United States Army court-martial 'to ninety-nine years at hard labor for absence without leave, desertion, and escape,' the New York *Globe* is 'reminded of a Gilbert and Sullivan potentate, merrily assigning the day's work to his headsman.' When 'boyish pranks in the Army, incorrigibility under discipline, or in some instances conflict between duty to country and duty to hungry family at home, brought soldiers in uniform sentences ten times heavier than the courts were dealing out to the *Kultur* whelps who were traitors to America and friends of the enemy,' it seems to *The Globe* that Senator Chamberlain and Lieutenant-Colonel—formerly Brigadier-General—Ansell are more than justified in demanding court-martial reform. The Providence *Journal* is impressed by the 'growing mass of evidence' that the penalties inflicted by many of the 350,000 courts-martial held during our first year of war 'were unduly harsh, to say nothing of the contention that the rights of the defendants were often not properly safeguarded.' The Buffalo *Evening News* finds the Army law system 'archaic' and 'pitilessly cruel' in many cases. Observing that 'there is sometimes justice in a court-martial, but it is purely accidental,' the Washington *Post* calls the system 'hideous,' while the pro-Administration New York *World* characterizes it as 'lynch law for the Army.' Even though some of the stories of injustice

may be distorted or exaggerated, the Newark *News*, generally friendly to the Administration and the Secretary of War, finds it clear enough that the system 'is out of date and needs to be reformed.'

A group of lawyers who held commissions during the war and were assigned to the Judge-Advocate General's Department have joined in giving out a statement to the press asserting that—

'Our court-martial system has been inherited from English law as it existed prior to the American Revolution; it had its inception in medieval days when soldiers were not free citizens of the flag under which they served, but were either paid mercenaries or armed retainers of petty lords. Those were times when armies were made up of men who constituted the dregs of society, or were no more than the chattels of military commanders. England, France, and other democratic countries have changed and liberated their military codes so as to insure justice to their soldiers; but our armies are still governed by this brutal medieval court-martial system which has survived outside of the United States only in Germany and in Russia.'"

The chairman of the Senate Committee on Military Affairs, on March 10th, 1919, according to the Associated Press dispatches, described the sort of procedure to which four million young men of America have been subjected, thus:

"These sentences are imposed absolutely without any system in the administration of the criminal laws of the land, and they are really imposed at the order of the commanding officer, because if the court makes a rul-

ing which is unpopular to the commanding officer he will order the court reconvened and, in some cases, issue instructions to it.

• • •  
I have found boys of 17 and 18, not yet mature, sent away for long terms in prison, some of them because they were absent without leave—homesick youths who left to say goodby to their mothers or perhaps a last word with their sweethearts. Five days away led one of them to be sentenced for forty years."

The following statement appears in the Congressional Record for March 4, 1919, page 5269:

"The United States, a nation which prides itself on the civil rights and freedom of its citizens, has a military code as archaic and despotic as that of Czar or Kaiser.

In every other enlightened and free country, a soldier, no matter how low his rank, is tried by a military code which affords to him substantially the same protection as is given a civilian when tried by a civil court. In our army, however, a soldier is a creature without liberty or rights except those that the commanding officer may give him. This is a statement of an ugly fact, a fact which is sought to be successfully concealed under a mass of forms and ceremonies."

The Articles of War do not authorize common soldiers to serve as members of courts-martial. Articles 4 to 7 provide that no person "shall be competent to serve on courts-martial for the trial of any person" excepting officers in the military and marine corps services; these officers are ap-

pointed to serve by the commanding officer who has ordered the accused to be tried for crime. This method of constituting the tribunal deprives a common soldier of all semblance of a trial by his peers or equals who can understand or appreciate the intent or motive which prompted the act or omission for which he is being tried. Even Germany grants this right to its soldiers. No German soldier can be convicted of an offense by a court-martial unless his peers sit as members of the court which convicts him. In Vol. 6 New International Encyclopedia, page 189, it is said:

"In the trials of enlisted men (in Germany) a certain proportion of the members of the court are of the rank of the accused."

The United States makes no provision for the aid or assistance to the court of men learned in military or other variety of law. It is assumed that the average man decorated with sword and spurs and a court-martial manual is as fully competent to try a man for his life as the most learned Judge of the Federal Court and to decide not only the *facts* but the *law also*. The Articles do not contemplate that lawyers shall sit on the court. This is also true of the prosecuting officer. Hence the tribunal is calculated to register the will of the commanding officer without regard to the laws of the country in matters involving the life and liberty of the citizen. Here again our laws do not favorably compare with those of Germany for there military lawyers are attached to each regiment to see that courts-martial administer criminal

United States have subjected the soldier to trial and conviction for all the crimes of which a civilian can be guilty and have also piled Pelion upon Ossa by enabling courts-martial to invent crimes and impose punishment without limit. The most baleful feature of the Articles of War is this power on the part of army officers to imagine or create crimes and to look to their discretion or conjecture alone for the measure of punishment. Articles 54 to 96, inclusive, are denominated Punitive Articles. A few of those forbid the imposition of the death sentence unless the offense be committed in time of war. Such are Articles 58 and 59. With the exception of the 82d and 92d Articles, which provide for death or life imprisonment, nearly all the others end with the phrase "shall suffer such punishment as a court-martial may direct." That is to say, the measure of punishment is the *discretion* of the court-martial, while the definition of the offense is also the *discretion* of the court-martial. The 96th Article contains a blanket provision which caps the climax in this regard:

"Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

It has been held that a soldier can be punished under this last article for any disorders, conduct or offenses which in the *opinion* of the tribunal or accused officer amount to a disorder, misconduct or offense and then any conceivable punishment whatsoever, including death, save "flogging, branding, marking or tattooing on the body" (41) which the imagination of the court-martial suggests can be inflicted. Does it not follow that the military code duplicates Draco's? Of that bloody code it has been said: "For nearly all crimes was the same penalty of death. The man who was convicted of idleness, or who stole a cabbage or an apple was *liable* to death no less than the robber of temples or the murderer." (Plutarch, Life of Solon.) It is manifest that the author of the Articles of War looked to the bloody Grecian model rather than to the precepts of Jehovah (Deuteronomy, Chap. 25) or the page of Horace (1 Sat., iii, V. 77 and 119), or the lessons of Grotius (Chap. XX), for his inspiration when penning this merciless code. Does it not follow that the four million citizens who were swept into the army of the United States have been reduced to that condition which Blackstone describes as slavery? If it be "one of the genuine marks of servitude to have the law which is our rule of action either concealed or precarious" (4 Inst. 332 Bl. Bk. 1, 416), does it not follow that the American soldier is a slave from every viewpoint of that common law which has been the glory of England?

"It is one of the glories of our English law that the species, though not always the

quantity or degree of punishment is ascertained for every offense and that it is not left in the breast of any judge nor even a jury to alter that judgment which the law has beforehand ordained for every subject alike without respect of persons." (Bl. Bk. 4, p. 377.)

A British statesman once inveighed against the policy of trying American Colonists before British courts upon conjecture when he said:

"\* \* \* I would, sir, recommend to your serious consideration whether it be prudent to form a rule for punishing people, not on their own acts, but on your *conjectures*? Surely, it is preposterous at the very best." (Burke on Conciliation.)

Respondent justifies the trial of petitioners for a civil crime within the geographical limits of the states of the Union at a time when the courts are open and when there was no war in this country but merely preparation for war on the ground of *necessity*. This is, the age-old excuse which has ever been given by men in places of power for tyranny and oppression. They assert that this conduct on the part of army officers and on the part of Congress in authorizing them to do so is not only necessary but proper in these United States. We direct attention to the fact that that nation which has produced the world's greatest soldier, and which first introduced standing armies into Europe in the year 1445 (Bl. Com., p. 1414), after all those centuries of experience with standing armies, finally abolished courts-martial.

"In 1908 France took steps to abolish court-martial in time of peace, all common law

offenses to be judged by the ordinary courts and breaches of military discipline such as rebellion, insubordination, desertion and the like by mixed courts composed of civil and military magistrates." (Vol. 18, Ency. Britt. p. 449.)

In the year 1908 the French nation and French armies were standing in the shadow of the Prussian menace and were engaged in preparations for war on the same proportionate scale as the United States in July, 1918. The same condition existed in France up to the year 1914. In August of the latter year at the Marne the soldiers of France who were permitted to participate in the liberties which the non-military citizens of that republic enjoyed for the preceding six years performed an exploit which exceeded that of any mercenary army that had ever been benefited or oppressed in times of peace by the species of discipline visited upon men by courts-martial. That the oppressive method of discipline applied in the army of the United States is necessary in the sense contended for by respondent is merely an assertion upon the part of militarists who think that fear is the mainspring of human action. But according to that statesman who desired death if he could not have liberty, "fear is the passion of slaves." (Beveridge Life of Marshall Vol. 1, p. 398.) To justify the reduction of four millions of men to the condition described by the acting Judge Advocate General and referred to by Montesquieu and Blackstone at page 416, Book 1, as reducing soldiers to the same condition of slavery as the "eunuchs in the eastern seraglios," the necessity

must indeed be great. Their condition is more deplorable than that of the negro slaves of sixty years ago. No necessity warrants this oppression. It has not even the merit "that the end justifies the means." Even if it had that would not justify a departure from constitutional forms.

"Nothing that the worst men ever propounded has produced so much oppression, misgovernment, and suffering, as this pretense of state necessity. A great authority calls it, the tyrant's plea; and the common honesty of all mankind has branded it with infamy."

\* \* \* \* \*

(4 Wall. 75, 76.)

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of *necessity* on which it is based is false, for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence.",

(4 Wall. 120.)

"Every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers toward the Constitution of a country, and forms a prec-

edent for other breaches, where the same plea of necessity does not exist at all, or is less urgent and palpable."

(Hamilton Federalist No. 25.)

It thus appears that it was the idea of the framers of the Constitution and of the Supreme Court of the United States that necessity did not justify the abrogation of the Constitution. So that if we agree that courts-martial were necessary to accomplish the objects which respondents desire to accomplish, yet that necessity does not justify violations of the fundamental law. The assumption that the severity of the punishment authorized by the Articles of War is necessary is contradicted by the experience of other countries.

The following significant sentences show that it was *love of country* rather than *fear of punishment* that was responsible for those victories which are England's glory:

"Do you imagine, then, that \* \* \* it is the annual vote in the Committee of Supply which gives you your army, or that it is the Mutiny Bill which inspires it with bravery and discipline? No! surely no! *It is the love of the people; it is their attachment to their government, from the sense of the deep stake they have in such a glorious institution, which gives you your army and your navy, and, infuses into both that liberal obedience without which your army would be a base rabble, and your navy nothing but rotten timber.*"

(Burke on Conciliation.)

The validity of that claim is contradicted by the history of the English people from the time of King John to William III. It was only when the English nation really became a conquering nation that it was found necessary to enact the Mutiny Act. The immediate occasion of the enactment of that law, as shown by its preamble, was the projected invasion of France, and of a neighboring island to the west of England. The history of the Colonies and the history of this country show that the jurisdiction contended for was expressly denied by the law first enacted in 1775 by the Continental Congress, and which was in force in one form or another until the year 1916. *Caldwell v. Parker, supra*, is the first case in which the contention that a court-martial has jurisdiction in a capital case to try a soldier for a purely civil crime was advanced. If the country could successfully pilot its armies through a revolution, through the war of 1812, through the Mexican war, the Civil War, the Spanish War, and the Philippine and Boxer Rebellions without having said army subjected to the disciplinary power here contended for, it is reasonable to suppose that if experience be worth anything, or be capable of demonstrating any simple fact, that that experience has absolutely demonstrated that the extraordinary jurisdiction assumed in this case is not only not unnecessary, but is a violation of the first principles upon which the civilization of Anglo-Saxon communities is founded.

### Conclusion.

The experience of England and France discloses that while a discipline enforced by courts-martial may be necessary for the *mercenary soldiers of a regular or standing army*, yet the efficiency of a *citizen soldiery* does not depend upon that variety of discipline.

During the years, when the nation from which we derive our language, laws and ideas of liberty was growing into strength, and safeguarding the constitutional rights of its citizens, no man, soldier or civilian, within the geographical limits of England could be tried on any charge of crime excepting by his peers. England's most glorious victories, both in domestic and foreign wars, were won by soldiers, who, while in England, were entitled to invoke the provisions of the Englishman's constitution or charter of liberties when charged with infractions of the law applicable to men in their civil or military capacities. It is true that when they left the limits of England, where war was flagrant, they were subject to the will of the commander or King (2 Wilson, Rep. 314), and the only restraint upon that arbitrary will was the salutary one incident to the comradeship engendered by encountering common dangers and enduring common hardships, in distant lands beyond the sea. Shakespeare, in his Henry V, puts the words:

"We few, we happy few, we band of brothers;  
For he, today that sheds his blood with me,

Shall be my brother; be he ne'er so vile,  
This day shall gentle his condition."  
(King Henry V, Act IV, Scene III.)

into the mouth of the King at Agincourt, thus epitomizing this greatest of all restraints. Crecy, Poitiers, Agincourt, Towton Field, Marston Moor and Naseby were the fields on which England won her early glories and preserved her early hard won liberties. Not a soldier who fought on those bloody fields could within the geographical limits of England, when the courts were open, be tried by a court-martial. That is to say, discipline was maintained by the courts of the common law during the preparation period. In those courts they could be tried only by their peers. It was the iron discipline observed by the silent English bowmen when the German Knights and Genoese, with loud shouts, leaped forward to the encounter, that won the contest. (Green's Short Hist., 229.) Similar discipline was shown at Poitiers (Green's Short Hist., 230), and Agincourt, where eight thousand English soldiers defeated sixty thousand French and captured their King. (Green's Short Hist., 268.) In our day the soldiers of France prepared for war between the years 1908 and 1914 without the aid of a court-martial, and as a result of their discipline can point to the Marne, Verdun and other battle scenes as demonstrating their superiority in crucial contests over the court-martial disciplined soldiers of Germany. The soldiers of France who were permitted to invoke the laws of the Republic, guaranteeing liberty, equality and fraternity to its citizens within the limits of France in the same way as the ordinary

citizen could invoke those laws, are shown by this recent experience to have been more efficient than men who were subjected to enslaving articles of war.

To hold that the Constitution extends the judicial power to all cases in law arising under the constitution and laws of the United States, and that the trial of all crimes except in cases of impeachment, shall be by jury and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and that no person shall be deprived of his life without due process of law, and that the Constitution was adopted to establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty to all persons *within* the United States, and at the same time, to hold that one of the Governmental departments created by the Constitution can create a land force consisting of all the able-bodied men in the country and, by articles of war, enacted under the guise of rules for the government and regulation of that force, authorize them to commit, upon the civilian inhabitants and their fellow soldiers every crime to which the United States statutes attach a penal sanction, and then withdraw jurisdiction from the courts while they are, open and able to try such soldier and apply such sanction is equivalent to holding that the Constitution imposes no restraint whatever upon the Congress with reference to the one particular source of power and danger against which the English-speaking peoples have always striven. If the contention that Congress can, within the geographical limits of the United

States when the courts are open, deprive the courts of jurisdiction to try and punish any men or set of men and vest such jurisdiction in courts-martial only be valid, then the contention that Congress could so legislate with reference to crimes committed by members of the land forces as to deprive courts-martial as well as the civil courts of jurisdiction to try and punish such men for civil crimes would be also valid.

We submit that such a contention is a contention that makes for the destruction of organized society, and if it be sustained, our Constitution is but a rope of sand, for the Constitution, instead of carrying its protection in its own bosom, carries the seeds of destruction therein, and if ever the doctrine becomes fully established that the legislative department of the Government has such plenary powers, then the liberty of the citizen is gone.

As it is the province of the courts to administer justice and to prevent the administration of injustice or the existence of a system by which injustice can be administered, we respectfully submit that it is the duty of this court in so far as it can do so on the facts now before it to give this system its death blow by holding that soldiers in the United States cannot be deprived of their lives or liberties except after a trial by juries of their peers. Should the courts fail in the performance of this plain duty then it is apparent that we have finally and forever bowed the knee to force. "Those who have once bowed the knee to force, must expect that force will be forever their master" (Hallman's Const. His. England I. Chap 10). "Let

us beware how we borrow weapons from the armory of arbitrary power. They cannot be wielded by the hands of a free people. Their blows will finally fall upon themselves". (Ex-Justice Benjamin R. Curtis, Constitutional History of the United States, page 682).

Respectfully submitted,

MARTIN J. O'DONNELL,  
L. B. KIMBRELL,  
*Attorneys for Appellants.*

JUN 6 1921

KODIAKE COUNTY D.

No. 421.

In the

# Supreme Court of the United States

Convened June, 1921.

GEORGE N. KILLY, DONALD FISHER, ROBERT L.  
LUDCOCK et al., Appellants.

vs.

WALTER V. ANDERSON, Warden of the United  
States Penitentiary at Leavenworth, Kansas,  
*Respondent.*

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## APPLICATION FOR RE-HEARING.

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GEORGE N. KILLY,  
WILLIAM BUCHHOLZ,  
ISAAC B. KIMMELL,  
MARTIN J. O'DONNELL,  
Attorneys for Appellants.

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In the  
**Supreme Court of the United States**  
October Term, 1921.

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ALEXANDER KAHN, DONALD FISHER, ROBERT L.  
LECOQ *et al.*, *Appellants.*

vs.

AUGUST V. ANDERSON, Warden of the United  
States Penitentiary at Leavenworth, Kansas,  
*Respondent.*

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No. 421.

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**PETITION FOR RE-HEARING.**

*To the Honorable Supreme Court of the  
United States:*

The appellants respectfully state that the opinion of this Honorable Court and the judgment rendered by this court in this case on the 31st day of January, 1921, affirming the judgment of the trial court, which court dismissed appellants' peti-

tion for a writ of habeas corpus, is based upon certain misconceptions of the facts contained in the transcript of the record herein, and of the law applicable to those facts as hereinafter more fully appears.

The opinion of this court contains the following recital:

"The petition for habeas corpus filed by the appellants on *June 11, 1920*, to obtain their release from confinement in the United States *Disciplinary Barracks* at Leavenworth, having, on motion of the United States, been dismissed on the face of the petition *and documents annexed*, the appeal which is now before us was prosecuted. We are therefore only concerned with the issues which legitimately arise from that situation."

The record (Rec. 13) shows that the petition for the writ was filed on April 14, 1920, and not on June 11, 1920, as the opinion recites. The petition also discloses that appellants did not seek their release "from confinement in the United States Disciplinary Barracks," but from "the *United States Penitentiary*, at Leavenworth, Kansas" (Rec. 2), where they are held by the warden of said Penitentiary.

If the decision of the court upon the issues involved be correct, then the misrecital of the facts contained in the foregoing paragraph was not prejudicial to the appellants, but we direct the attention of the court to these errors for the reason that they are merely evidence that this case has not been considered by the court sufficiently to

enable it to grasp the real point made by the appellants, which is that the phrase "time of peace" in the 92nd Article of War, since it deals with the jurisdiction of both civil and military courts, should be held to mean what it has been held by the courts to mean from time immemorial, to-wit: "*If the courts are open it is a time of peace.*" We think the seriousness of the question involved would at least justify the court in again carefully reading the record and brief of appellants.

The opinion also contains the following recital:

"The release which was prayed was based upon the following grounds: (1) Alleged illegality in the constitution of the court; (2) an assertion that the petitioners did not possess the military status essential to cause them to be subject to the court's jurisdiction; (3) that their subjection, even if they possessed such military status, to be tried by court-martial, deprived them of asserted constitutional rights, and (4) that in no event had the court-martial power to try them for murder under the conditions existing at the time of the trial."

The said recital in the opinion fails to disclose that the release prayed for was based upon the following ground, which was the *only jurisdictional question raised before the court-martial*.

"\* \* \* that your petitioner, Francis J. Cooney, who was a drafted soldier at the time he became a general prisoner objected to the jurisdiction of said court-martial on the

ground that the 92nd Article of War prohibited the trial of any person by court-martial for murder committed within the geographical limits of the states of the Union in time of peace and that it *was a time of peace in the State and District of Kansas* and within the geographical limits of the United States on the 29th day of July, 1918; that all of your petitioners concurred in said objection to the jurisdiction of said court-martial; that said plea to the jurisdiction was then and there overruled by said court-martial. (Rec. 5.) \* \* \*

Your petitioners further state that the courts of the United States in the District of Kansas and throughout the United States and the courts of the State of Kansas and the several states, *were, on the 29th day of July, 1918, and since have been and now are open and engaged in the free and uninterrupted and prompt administration of justice and that said 29th day of July, 1918, was a time of peace in the said State and District of Kansas* and within the geographical limits of the States of the Union and District of Columbia.

And your petitioners state that the rights of your petitioners under the 92nd Article of War, which provides that no court-martial shall have jurisdiction to try any person for murder committed within the geographical limits of the States of the Union and the District of Columbia, *in time of peace*, have been violated by the said trial conviction and sentenced on said charge of murder." (Rec. 11.)

The principal contention made by the appellants not only before the court-martial, but before

the trial court and this court, was that on July 29, 1918, it was a *time of peace within the state and district of Kansas for the reason that the courts were open*. This, the main ground, was wholly ignored in the opinion.

And appellants respectfully state that the opinion of this court in this cause contains the following recital:

"The order assigning the retired officers to the court is within the authority conferred by the Act of April 23, 1904, c. 1485, 33 Stat. 264, which provides that the 'Secretary of War may assign retired officers of the Army, with their consent, to active duty upon courts-martial.'"

The said recital, in connection with the recital in the opinion, holding that it was not a time of peace in the state and district of Kansas is in direct conflict with the provisions of the Manual of Courts-martial, by virtue of which courts-martial are governed in the exercise of their jurisdiction and are governed with respect to the qualification of their members as shown by Clause 9 of Section II, of said Manual of Courts-martial, subdivision b, which is as follows:

"(b). A retired officer may be assigned with his consent to active duty upon courts-martial *in time of peace* (act of April 23, 1904, 33 Stat. 264), and if employed on active duty in time of war in the discretion of the President (Sec. 24, Act of June 3, 1916, 39 Stat. 183), he is eligible for court-martial duty. At other times he is not available for

such duty except that when placed in command of a post under the Act of August 29, 1916 (39 Stat. 627), or when assigned to recruiting duty he may act as summary court-martial when he is the only officer present."

If it was a time of peace the retired officers were qualified if they were assigned to duty on the general court-martial with their consent; if it was a time of war then it was a condition precedent to their having been assigned to duty on the court-martial that they were employed on active duty before being so assigned and this fact should have appeared from the face of the record. But the recital in the opinion, asserting that the order assigning the retired officers to the court was within the authority conferred by the Act of Congress in question, is in *direct conflict* with the provisions of the court-martial in which it is expressly stated that a retired officer may be assigned with his consent upon courts-martial *only in time of peace*. When taken in connection with the last sentence of the above quotation to the effect that "at other times he is not available for such duty, except that when placed in command of a post under the act of August 29, 1916, 39 Stat. 627, or when assigned for recruiting duty he may act as summary court-martial when he is the only officer present the error is made more manifest." The Act of Congress gives the President power to promulgate the manual for courts-martial, and hence its provisions control the disposition of this cause as much as the act authorizing its promulgation and the very existence of courts-martial.

We therefore respectfully submit that if it was a time of peace for the purpose of qualifying the retired officers, it was also a time of peace for the purpose of depriving the court-martial of jurisdiction to try appellants on a charge of murder, and hence since the decision and opinion herein conflict with both reason and authority, this petition for rehearing should be sustained and the judgment reversed.

And of the matters and things herein contained appellants pray the judgment of the court.

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#### Suggestions in Support of Petition for Re-Hearing.

##### I.

It was the function of this court on the record before it to determine whether or not the appellants committed the alleged crime during a time of peace in the State and District of Kansas, to-wit, on the 29th day of July, 1918, as a question of fact and not to permit the political department of the government to determine that question for the court.

The rule followed by the English and American courts from the time of the decision in Lancaster's case, 1st St. Tr. 39, to the time of the decision of the case of *Caldwell v. Parker*, 252 U. S. 376, in cases where the test of the jurisdiction of a court

to try a man for his life was dependent upon whether or not it was a time of peace or war, has always been determined as a *question of fact* and not as a *political question*.

In Vol. 3, Thomas Ed. Coke's 1st Int., pages 39, 40, 41, it is said:

"And, therefore, when the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence and distribute justice to all, it is said to be time of peace. So when, by invasion, insurrection, rebellions or such like, the peaceable course of justice is disturbed and stopped so as the courts of justice be, as it were, shut up, *et silent leges inter arma*, then it is said to be time of war. *And the trial hereof is by the records, and judges of the courts of justice; for by them it will appear whether justice had her equal course of proceeding at that time or no.*"

## II.

The test applied by the courts of England and the United States from the year 1327 to the time of the decision of *Caldwell v. Parker*, 252 U. S. 376, in April, 1920, to determine whether or not it was a time of peace or war, was whether or not the courts were open and able to administer justice, and if they were, then if the jurisdiction of a military court was dependent upon the existence of the one state or the other, the military court could not exercise any jurisdiction if the civil court could function.

In Lancaster's case, 1st St. Tr. 39, the judgment of a military tribunal was reversed and the

confiscated estate of a deceased soldier returned to his heirs for the reason that the sentence of the military tribunal which deprived him of his life and property was imposed in England at a time when the courts were open. Thus:

"\* \* \* and so, without arraignment and answer, the said Thomas erroneously and against the law of the land, *in time of peace*, was sentenced to death; by reason whereof, because it is notorious and manifest that the whole time in which it was charged against the said Earl, that he committed the aforesaid offenses and crimes in the aforesaid record and proceeding contained, and also the time when he was taken, and when the said lord the king's father, etc., caused it to be recorded that he was guilty, and when he was sentenced to death, *was time of peace*; *in particular because throughout the whole time aforesaid, the chancery and other places of the courts of the lord the king, were open, and in them law was done to every one as it used to be done*; \* \* \* the aforesaid lord, the king's father, etc., ought not, in such time of peace, to have caused such record to be made against the said Earl, nor to have sentenced him to death, without arraignment and answer: Also, he says, that there is error in this, that whereas the aforesaid Earl Thomas was one of the peers and great men of this kingdom, and in the Great Charter of the Liberties of England it is contained, that no free-man shall be taken, imprisoned, or disseised of his freehold or franchise, or his free customs, or outlawed or banished, or in any manner destroyed, nor shall the lord, the king, by himself or others, proceed against him, but by the lawful judgment of his peers,

or by the law of the land, the earl Thomas was by the record of the lord the king as aforesaid, *in time of peace*, erroneously sentenced to death without arraignment or answer, or the lawful judgment of his peers, against the law, etc., and against the tenor of the aforesaid Great Charter."

It will be observed that in that case it was held that it was a *time of peace* because "the chancery and other places of the courts of the lord, the king, were open, and in them law was done to everyone as it used to be done."

The same rule was applied in Strafford's case, 3 St. Tr. 1,382.

In *Coleman v. Tenn.*, 97 U. S. 509, in construing the Article of War giving courts-martial jurisdiction to try soldiers for murder in time of war, this court held that said Article of War did not operate to give a court-martial jurisdiction to try a soldier for such crime in any case where in the territory in which the court-martial was sitting "the civil courts were open and in the undisturbed exercise of their jurisdiction." (p. 515.)

In Vol. III, Thomas Ed. Coke's 1st Inst., p. 39, 40, 41, it is said:

"First, it is necessary to be known what shall be said to be time of peace, *tempus pacis*; and what shall be said *tempus belli sive guerrae*, time of war. *Tempus pacis est quando cancellaria, et aliae curiae regis sunt apertae, quibus lex fiebat cuicunque prout fieri consuevit.* And so it was adjudged in

the case of Roger Mortimer, and Thomas, Earl of Lancaster. *Utrum terra sit guerrina necne, naturaliter debet judicari per recorda regis, et corum, ui curias regis per legem terrae custodiunt, et gubernant, sed non alio modo.*

And, therefore, when the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence and distribute justice to all, it is said to be time of peace. So when, by invasion, insurrection, rebellion, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be, as it were, shut up, *et silent leges inter arma* then it is said to be time of war. And the trial hereof is by the records, and judges of the courts of justice; for by them it will appear whether justice had her equal course of proceeding at that time or no."

In *The Parkhill*, 18 Fed. Cas., p. 1187, it is said:

"The rule of the common law is that, when the regular course of justice is interrupted by revolt, rebellion, or insurrection; so that the courts of justice cannot be kept open, civil war exists, and the hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land. The converse is also regularly true; so when the courts of a government are open it is ordinarily a time of peace. \* \* \* The marshal of the United States, in order to keep the peace of his judicial district, and enable him to execute the process of the courts, may arm himself and his deputies, and may also call in the aid of a

warlike force. Y. B. 3, Hen. VII, Pl. 1; 5 Coke 72a; Br. Riots, pl. 2; Dall., c. 95; 8 Watts & S., 191; 5 C. & P., 254, 282. When he cannot, by such means, keep the peace in his district, and the courts in it no longer can direct the process to his, a state of war exists."

This court in *Ex Parte Milligan*, 4 Wall., l. c. 128, cited the decision in the Lancaster case with approval. Thus:

"— in the time of peace no man ought to be adjudged to death for treason or any other offense without being arraigned and held to answer and that regularly *when the King's courts are open it is a time of peace in judgment of law.*"

Lancaster was a soldier in the service of his King and country and was guilty of rebellion, but notwithstanding his trial and conviction by court-martial was solemnly denounced by the great court of the realm as illegal. The chief justice, concurring in the Milligan case, said:

"Where peace exists, the laws of peace must prevail."

In *Griffin v. Wilcox*, 21 Ind. 370, l. c. 378, Coke's definition has been cited with approval, where it is said:

"When the courts of justice be open and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, *it is said to be*

*time of peace.* So when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts be as it were shut up, *et silent inter leges arma*, then it is said to be time of war. Coke upon Littleton, as quoted in Law, Wheat. Int. Law, p. 525."

In the Prize Cases, 67 U. S. 635, it was held that the question as to whether or not it was a time of peace or war was to be determined as a question of fact and not to be determined by asking the political department of the government whether or not it was a time of peace or war. Thus:

Syll. 5. "A state of war may exist without any formal declaration of it by either party, and this is true both in civil and foreign wars."

Syll. 6. "A civil war exists and may be prosecuted on the same footing as if those opposing the government were foreign invaders whenever the regular course of justice is interrupted or disturbed by rebellion or insurrection so that the courts cannot be kept open."

Peace existed in the State and District of Kansas on July 29, 1918. Why does the principle not apply that "where peace exists the laws of peace shall prevail"?

### III

**The construction placed upon the 92d article of war in the opinion herein is in violation of**

**the principle heretofore recognized by this court that no intention should be ascribed to Congress to interfere with the regular administration of the justice in the civil courts in the absence of clear and direct language to that effect.**

The decision herein is directly contrary to the principle enunciated in *Coleman v. Tennessee*, 97 U. S. 509, and categorically approved in *Caldwell v. Parker*, 252, U. S., l. c. 385, where it is said:

“With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.”

The opinion herein construing the 92d Article is directly contrary to the opinion of the court in *Caldwell v. Parker, supra*, where the court said, l. c. 386:

“But the act did not purport to increase the general powers of court-martial by defining new crimes or by placing enumerated offenses within the category of military crimes as defined from the beginning, as we have already pointed out, but simply contemplated endowing the military authorities with power not to supplant, but to enforce the state law. As observed by Winthrop in his work on military law, 2nd Ed., page 1033, it was intended to provide through the military authorities means of enforcing and punishing crimes against state law committed by persons in military service, as the result of the existence of martial law or of military opera-

tions the courts of the state were not open and military power was therefore needed to enforce the state law. And it was doubtless this purpose indicated by the text to which we have already called attention which caused the court in Coleman case to say that the statute had no application to territory where 'the civil courts were open and in the undisturbed exercise of their jurisdiction'. (p. 515.)

#### IV.

**The opinion herein is based upon the theory that the appellants conceded that if the armistice had not been signed on November 11, 1918, the court would have had jurisdiction and it erroneously disposes of the appellant's real contention concerning this question by ignoring it.**

The opinion of this court is based upon the idea that the appellants conceded that if the armistice had not been signed on November 11, 1918, the court would have had jurisdiction.

The opinion recites:

"This brings us to the final contention that because when the trial occurred it was a time of peace no jurisdiction existed to try for murder \* \* \*. That complete peace in the legal sense had not come to pass by the event of the armistice and the cessation of hostilities is not disputable."

The foregoing quotation discloses that this court overlooked the real question in this case.

Apparently without reflection it applied the rule quoted by this court in *McElrath v. United States*,

102 U. S. 426 (where no question of jurisdiction of a court was involved), and announced in *U. S. v. Anderson*, 9 Wall 71, and in the Protector, 12 Wall 102, to the effect that for the purpose of determining property rights such as statutes of limitations and the right of an officer in the navy to draw his pay or to have discipline meted out to him by one arm of the executive government or another, such as by the President or his creature, a general court martial, that the phrase "time of peace" meant a time in which there was official recognition of that status.

The court in the Protector, 12 Wall 700, held:

Syll. 1. "The beginning and termination of the late rebellion in reference to acts of limitation is to be determined by some public act of the political department."

In *U. S. v. Anderson* the question as to when the abandoned or captured property rights act intended to be secured by the phrase "suppression of the rebellion" was to be regarded as having taken place at the time of the President's proclamation declaring that the rebellion had ended.

In none of those cases was any question of the jurisdiction of a court or tribunal involved. Article 92 is manifestly not an article of a disciplinary variety, but it is an article enacted for the purpose of inflicting punishment upon criminals who violate the ordinary laws of the land and *expressly providing for the jurisdiction of the courts* in which the trial shall be held. There is no

analogy between the statute authorizing the executive arm of the government to dismiss an officer for a breach of discipline and the jurisdiction of a court to try him for his life because of a violation not of a disciplinary rule, but because of his violation of one of the ordinary laws of the land made for the protection of society in general.

As pointed out in our brief, we submit that the phrase "time of peace" ought not where the lives and liberties of citizens are involved, receive a construction contrary to that which has been recognized for ages. To reiterate, the phrase "time of peace" with reference to the power of a military tribunal to deprive either a soldier or citizen or civilian of his life from the year 1322 until the opinion promulgated by this court has ever been defined to mean a time when the courts are open and able to administer justice.

## V.

**This court has decided in the opinion herein that for the purpose of qualifying the retired army officers who sat on the court-martial, it was a time of peace and for the purpose of giving the court-martial jurisdiction that it was not a time of peace but was a time of war and therefore the opinion is contradictory and not in accordance with the law. The opinion is a judicial paradox.**

Clause 9 of Section 11 of the Manual of Courts-martial, subdivision b, provides:

"(b) A retired officer may be assigned with his consent to active duty upon courts-martial *in time of peace* (act of Apr. 23,

1904, 33 Stat. 264), and if employed on active duty in time of war in the discretion of the President (Sec. 24, Act of June 3, 1916, 39 Stat., 183), he is eligible for court-martial duty. At other times he is not available for such duty except that when placed in command of a post under the act of August 29, 1916 (39 Stat., 627), or when assigned to recruiting duty he may act as summary court-martial when he is the only officer present."

In the opinion the court has said that the President had authority to appoint the retired officers because "the order assigning the retired officers to the court is within the authority conferred by the Act of April 23, 1904, c. 1485, 33 Stat. 264, which provides that:

"The Secretary of War may assign retired officers of the Army, with their consent, to active duty \* \* \* upon courts-martial \* \* \*

According to the Manual of Courts-martial the President did not have authority to order the retired officers to sit upon courts-martial except with their consent in *time of peace*. Unless it was a time of peace, therefore, the court-martial was not properly constituted. If it was a time of war the retired officers were not qualified.

**Conclusion.**

We respectfully request the court to examine what is said in appellants' brief from pages 83 to 106 concerning the meaning of the phrase "time of peace" in connection with its consideration of the petition.

Respectfully submitted,

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# In the Supreme Court of the United States.

OCTOBER TERM, 1920.

ALEXANDER KAHN ET AL., APPELLANTS,

v.

AUGUST V. ANDERSON, WARDEN OF THE  
United States Penitentiary at Leaven-  
worth, Kansas.

No. 421.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF KANSAS.*

BRIEF ON BEHALF OF THE APPELLEE.

## STATEMENT OF CASE.

As the case was decided below on a motion to dismiss the petition (R. 13, 14), its allegations are all that need be considered. It alleged (R. 3) that on July 29, 1918, the petitioners were each of them, respectively, serving at the disciplinary barracks at Fort Leavenworth sentences previously imposed by general courts-martial for military offenses committed during the year 1918; *but it did not allege that at the time of filing the petition the said prior sentences had expired. Nor did the petition allege that said prior sentences included, as part of the punishment,*

*discharge from the Army of the United States.* It then alleged that on October 19, 1918, the President, by special order published October 22, 1918 (and set out in the petition, R. 4), appointed a general court-martial to sit at Fort Leavenworth for the trial of such persons as should be brought before it. This court consisted of eight officers (R. 4), *but the order recited that a greater number could not be assembled without manifest injury to the service.* Of these officers, two were retired and three were members of the "United States Guards." On November 4, 1918, the petitioners were charged before this court with the murder of a fellow prisoner on July 29, 1918. On November 25th they were found guilty and sentenced, and the sentences were approved by the reviewing authority with immaterial variations. It is these sentences which the petitioners claimed were entirely void for the following reasons:

1. The court-martial consisted of less than 13 members in violation of the 5th article of war (R. 10).
2. The court-martial was not lawfully constituted in that—
  - (a) Retired officers sat on it without warrant of law (R. 10);
  - (b) Officers of the "United States Guards" sat on it and the record of the court does not show that these persons were officers in the United States Army (R. 10, 11).
3. The charge alleged that the murdered man was killed by striking, kicking, stamping, and by cutting

him with a knife, whereas the evidence showed that his death was caused by a fall (R. 11, 12).

4. The petitioners had been, prior to the commission of the murder of which they were convicted, discharged from the Army, as the result of their prior sentences, and therefore were not subject to military jurisdiction (R. 12).

5. There was peace in the State of Kansas and throughout the United States on the date of the murder, viz, July 29, 1918, for the reason that the civil courts throughout that territory were open, and hence the court-martial had no jurisdiction of a charge of murder (R. 11).

#### ARGUMENT.

POINT 1. The court-martial consisted of less than thirteen members in violation of article 5 of the Articles of War (act of August 29, 1916, c. 418, sec. 3, 39 Stat. 651).

This point was made as early as 1827 in *Martin v. Mott*, 12 Wheat. 19, 34, 35), and denied by Mr. Justice Story, delivering the opinion of the court, in the following language:

Supposing these clauses applicable to the court-martial in question, it is very clear that the act is merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive. But the present avowry goes further, and alleges not only that the court-martial was appointed by a general

officer commanding an army, that it was composed of militia officers, naming them, but it goes on to assign the reason why a number short of thirteen composed the court, in the very terms of the 64th article; and the truth of this allegation is admitted by the demurrer. Tried, therefore, by the very test which has been resorted to in support of the objection, it utterly fails.

Attention is called to the fact that the language of the avowry in *Martin v. Mott* (see 12 Wheat. 21) was precisely similar to special order No. 247 detailing the court-martial in the case at bar (R. 4). The rule thus laid down in *Martin v. Mott* was, on principle, affirmed in *Mullan v. United States* (140 U. S. 240, 245), and in *Swaim v. United States* (165 U. S. 553, 559, 560), and must be considered as settled.

POINT 2. The court-martial was not lawfully constituted in that—

(a) Retired officers sat on it without warrant of law.

Article 4 of the Articles of War (act of August 29, 1916, c. 418, 39 Stat. 651) provided that—

All officers in the military service of the  
United States \* \* \* shall be competent  
to serve on courts-martial.

In *United States v. Tyler* (105 U. S. 244) this court, after construing the statutes relating to retirement from active service in the Army, and section 1094, R. S. (at the time of the court-martial in the case at bar, act of June 3, 1916, c. 134, sec. 2,

39 Stat. 166), designating the composition of the Army of the United States, concluded (105 U. S. 246):

We are of opinion that retired officers are in the military service of the Government.

Such being the status of retired officers, who, were it not for the prohibition of section 1259, R. S., would be entitled, under the decision in *United States v. Tyler*, to sit on courts-martial without any specific authority, the act of April 23, 1904, c. 1485, 33 Stat. 264, Comp. Stats. 2078, provided in part that—

The Secretary of War may assign retired officers of the Army, with their consent, to active duty \* \* \* upon courts-martial  
\* \* \*

The record in the case at bar shows (R. 4) that the retired officers whose competency is objected to were assigned by the Secretary of War in Special Orders, No. 247 (R. 4) to sit on the court-martial which tried plaintiffs in error. Their judicial status, therefore, was determined by the act of April 23, 1904, c. 1485, *supra*, and they were clearly competent.

(b) "United States Guards" sat on the court-martial, whereas the record of the court does not show that they were officers in the military service of the United States as required by the 4th article of war, *supra*.

Section 2 of the selective draft act of May 18, 1917, c. 15, 40 Stat. 77, Comp. Stats. 2044 b, provided as follows:

*Provided*, That the President is authorized to raise and maintain by voluntary enlistment

or draft, as herein provided, special and technical troops as he may deem necessary, and to embody them into organizations and to officer them as provided in the third paragraph of section one and section nine of this act. Organizations of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality.

Pursuant to the authority so conferred, the President raised and organized the United States Guards under Special Regulations No. 101, the material portions of which are printed as an appendix to this brief. The above statute and regulations make it clear beyond question that officers of the United States Guards were "officers in the military service of the United States" within the meaning of the 4th article of war, *supra*. The words last quoted include officers in every branch of the service, e. g., Coast Artillery and Engineers, as well as Infantry and Cavalry, and necessarily, therefore, include United States Guards, who, if they were not "in the military service of the United States" were not in any service at all.

POINT 3. The allegations of the charge as to the manner in which the death of the fellow prisoner, for whose murder the appellants were convicted, was caused were not proved.

An objection, not going to the jurisdiction of the court-martial, but to the manner of its exercise of an undoubted jurisdiction, can not be made on habeas corpus. (*Smith v. Whitney*, 116 U. S. 167, 176, 177, and authorities cited.)

POINT 4. The appellants had been, prior to the commission of the offense, discharged from the Army, as the result of their prior sentences, and therefore were not subject to the jurisdiction of a court-martial.

(a) The petition does not allege that the prior sentences of each of the appellants, respectively, included, as part of the punishment imposed thereby, discharge from the Army of the United States. It merely alleges that the appellants were each serving sentences for terms of more than one year imposed by general courts-martial. It alleges also (it is true) that they were not members of or serving as soldiers in the Army (R. 8), and (R. 12) that by said sentences the appellants were discharged from the Army long prior to July 29, 1918. But these allegations are merely conclusions of law. If, in fact, the several sentences previously imposed on appellants contained, as part of the punishment, discharge from the Army, it would have been easy to allege the fact specifically, and it was the duty of appellants so to allege it, if the alleged discharge was to be made the basis for a collateral attack, by petition for habeas corpus, upon the jurisdiction of the court-martial. According to our information, even when discharge from the Army is made part of the sentence of a court-martial, that part of the sentence is suspended until complete

execution of the part imposing imprisonment. Such may have been the case as to appellants, if their sentences included discharge at all. At any rate the petition failed to sufficiently allege the fundamental fact upon which this point of objection is based.

(b) Even if the petition can be construed as sufficiently alleging that the previous sentence of each of the appellants included, as part of the punishment thereby imposed, discharge from the Army, and that said portion of the sentence was not suspended, the result is the same. The act of March 3, 1873, c. 249, 17 Stat. 582 (R. S. secs. 1344-1361), created a military prison for the confinement and government of all offenders convicted before any court-martial in the United States. Its officers and guards were soldiers. The Secretary of War was authorized to remit the sentences of deserving prisoners, and to give them an honorable restitution to duty if the case merited. Similar provisions existed at the time of the offense and trial of plaintiffs in error. (See act of Mar. 4, 1915, p. 143, sec. 2, 38 Stat. 1084, Comp. Stats. 2458a, Title 14, ch. 6.) In connection with the creation of this military prison, section 1361, R. S., provided:

All prisoners under confinement in said military prisons undergoing sentence of court-martial shall be liable to trial and punishment by courts-martial under the rules and articles of war for offenses committed during the said confinement.

In *Ex parte Wildman* (1876), Fed. Cas. 17658a, Judge Foster, District Judge for the District of Kansas, decided that a prisoner in the military prison whose sentence included discharge from the Army was subject to trial by court-martial under R. S. 1361, *supra*, and that the statute was constitutional. This decision was approved by Attorney General Devens (who had military as well as legal experience) in 16 Ops. A. G. 292, saying:

Though no longer a soldier, he is a military prisoner, and for the purposes of discipline and punishment is still connected with the military service. It is a case, to use the language of the Constitution, "arising in the land forces of the United States." It grows out of the prisoner's relation to the Army. Under the power to make rules for "the government and regulation of the land and naval forces," Congress has provided that cases of this class shall be tried by court-martial.

The same view was taken by a most able circuit judge, Thayer, in *In re Craig* (70 Fed. 969), where he said:

Much stress, however, is laid on the fact that when the offense for which Craig was tried and convicted was committed he had been discharged from the Army and was no longer subject to military law or discipline. This contention overlooks the fact that the discharge was issued in part execution of a sentence which directed that he should not only be dishonorably discharged, with the forfeiture

of all pay and allowances, but that he should also be held and confined at hard labor for a given period in a military prison. A discharge executed under these circumstances and for such a purpose can not be said to have had the effect of severing his connection with the Army and of freeing him forthwith from all the restraints of military law. The discharge was no doubt operative to deprive him of pay and allowances, but so long as he was held in custody under sentence of a court-martial, for the purpose of enforcing discipline and punishing him for desertion, he remained subject to military law, which prevailed in the prison where he was confined, and subject also to the jurisdiction of a court-martial for all violations of such law committed while he was so held. The views thus expressed are supported by an opinion of Judge Foster, United States district judge for the district of Kansas, in the case of *Ex parte Wildman* (Fed. Cas. No. 17653a), which was decided in the year 1876; also by an opinion of Attorney General Devens (16 Ops. Attys. Gen. 292) and by an elaborate decision of Judge Sawyer in *Re Bogart* (2 Sawy. 396, Fed. Cas. No. 1596).

Finally, in *Carter v. McClaughry* (183 U. S. 365, 383), this court said:

The accused was proceeded against as an officer of the Army and jurisdiction attached in respect of him as such, which included not only the power to hear and determine the case but the power to execute and enforce the sentence of the law. Having been sentenced,

his status was that of a military prisoner held by the authority of the United States as an offender against its laws.

He was a military prisoner though he had ceased to be a soldier, and for offenses committed during his confinement he was liable to trial and punishment by court-martial under the rules and articles of war. (Rev. Stat., sec. 1361.)

The court also pointed out that in *Coleman v. Tennessee* (97 U. S. 509) it had been held that a sentence of a court-martial might be carried out after the person convicted had severed all connection with the Army and that Attorney General Devens had subsequently advised as to Coleman that he might be executed in pursuance of the sentence of death.

The jurisdiction conferred by section 1361, R. S., and construed in the above authorities was subsisting when the appellants in error were tried, paragraph (e) of the 2d article of war (act of August 29, 1916, c. 418, sec. 3, 39 Stat. 651, Comp. Stats. 2308a) providing that "all persons under sentence adjudged by courts-martial" were subject to the Articles of War.

The claim that such a provision is unconstitutional overlooks the broad powers conferred by the Constitution on Congress to raise and support armies and to make rules for the government and regulation of the land and naval forces, as well as the broad exemption of the 5th amendment, viz, "cases arising in the land or naval forces." The jurisdiction so conferred and excepted is not confined to persons who are strictly in the Army proper nor to their

strictly military duties. (As to the latter, see *Smith v. Whitney* 116 U. S. 167, 183-186). For a long time the jurisdiction has been extended to retainers to the camp and to persons serving with the armies in the field, and this jurisdiction has been sustained by the courts. (See, e. g., *Ex parte Gerlach*, 247 Fed. 616; *Ex parte Falls*, 251 Fed. 415; *Hines v. Mikell*, 259 Fed. 28, C. C. A. 4th, cert. den. 250 U. S. 645.) *A fortiori* a person who has changed his status as a soldier only to become a military prisoner can, under the powers over the land and naval forces conferred on Congress by the Constitution, be still left subject to court-martial jurisdiction.

POINT 5. It was a time of peace throughout the United States and the State of Kansas, the courts being open and engaged in the free, uninterrupted, and prompt administration of justice, at the time the offense of murder was committed, and therefore the court-martial had no jurisdiction.

The charge upon which appellants were convicted was violation of the 92d article of war (act of August 29, 1916, c. 418, 39 Stat. 664, Comp. Stats. 2308a), which reads as follows:

Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may (be) direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

As indicated above, it is claimed that the limiting words in this article, "in time of peace," mean "in a time when the ordinary civil courts are fully and freely open at the place where the court-martial is held or (at any rate) at the place where the offense is committed."

(a) It, of course, can not be denied that at the time the offense was committed, viz, July 29, 1918, and at the time when the court-martial convened, viz, November 4, 1918 (R. 6), the United States was at war. Some point is made that sentence was not pronounced until after the armistice was signed. But apart from the fact that article 92, *supra*, differing perhaps in this respect from section 1342, R. S., article 58, related the "time of peace" to the commission of the offense, not to the trial, it is settled that if jurisdiction once validly attaches as, e. g., by formal charges and convention of the court, subsequent events can not divest it. (*Carter v. McClaughry*, 183 U. S. 365, 383.) Therefore the case at bar is not complicated by any question as to the effect of the armistice.

The words "in time of peace," in connection with the trial of soldiers for offenses over which the civil courts would ordinarily have jurisdiction, first appeared in article 92, *supra*. The matter had previously been treated as a qualification of, and not as an exception from, the grant of jurisdiction; and being so treated, the converse words "in time of war" had been properly used. (Act of March 3,

1863, c. 75, sec. 3, 12 Stat. 736; R. S. 1342, article 58.) But (so far as we can see) the difference in phraseology has no materiality for the determination of the question, viz., whether the words "time of peace" or "time of war" in this connection connote generally the period of time when the United States as a body politic is at peace or at war, or whether they connote merely a physical condition of war or peace in a particular portion of the United States to be determined mainly by the test whether the civil courts in that particular portion are in the full and free exercise of their functions or not.

It can not (we think) be doubted that the natural meaning of these words is that first given above, viz., the period of time during which the United States, as a body politic, is at war or at peace. Certainly such a meaning would be given them in a Federal statute unless there were strong circumstances indicating that Congress had used them in some other sense, and the opinion of this court in *Hamilton v. Kentucky Distilleries Company* (251 U. S. 146), seems to imply as much. Moreover, the words are used in other provisions of the Articles of War where it seems to be impossible to give them any other than a broad meaning. Section 38 of the act of March 3, 1863, c. 75, 12 Stat. 737 (in which statute provision was first made for the trial by court-martial of murder, etc.), provided that "in time of war" persons acting as spies in or about any fortifications, posts, quarters, or encampment of any of the armies of the United States should be triable

by court-martial and suffer death. Here, if the intent of Congress is to be carried out, the words can not have the limited meaning. It is true that the offense defined in this statute may not be justiciable in the civil courts; but that (it would seem) cannot affect the question as to the intent of Congress in using the words "in time of war."

The act of July 13, 1866, c. 176, sec. 5, 14 Stat., 92, R. S. 1342, article 99, provided that "in time of peace" no officer of the Army should be dismissed from service except pursuant to sentence of a court-martial. In *McElrath v. United States* (102 U. S., 426, 438) this court, speaking by Mr. Justice Harlan, held in regard to this provision as follows:

That act assumes to control the President, in the matter of dismissing officers from the naval and military service, only in *time of peace*. Its purpose was, upon the declaration of peace, to suspend the broad power which he exercised during the recent rebellion, when prompt, vigorous action was often demanded, to dismiss an officer from the service whenever, in his judgment, the public interests would thereby be promoted. But when was the rebellion suppressed and peace inaugurated? Not until the twentieth day of August, 1866, on which day the President announced, by proclamation, that the insurrection against the national authority was at an end, and that "peace, order, tranquillity, and civil authority" then existed "in and throughout the whole of the United States of America!" \* \* \* Since peace, in contem-

plation of law, could not exist while rebellion against the National Government remained unsuppressed, the close of the rebellion and the complete restoration of the national authority, as announced by the President and recognized by Congress, must be accepted as the beginning of the "time of peace," during which the President was deprived of the power of summarily dismissing officers from the military and naval service.

So the words "in time of war" in R. S. 1342, article 59 (delivery of soldier to civil authorities) and in article 73 (commander competent to appoint general court-martial) can only (it seems) have the broad meaning. The same may be said of article 45 of the act of August 29, 1916, c. 418, 39 Stat. 657, Comp. Stats. 2308a, which provides that where the punishment is discretionary it shall not, "in time of peace," exceed such limits as the President shall prescribe.

When the main object and efficient scope of article 92, *supra*, are considered the result (it would seem) is that the broad meaning of the words "in time of peace" must be adopted, because it is the state of war, *per se*, which necessitates a larger and more drastic control over the military forces, and not the particular place at which those forces may happen to be located. But further consideration of this argument is for clearness postponed till a word is said as to the causes which have induced a correlation between the phrases "in time of war" and "in time of

peach" and the sessions of the civil courts. These causes are two, viz:

(1) The confusion originally existing between military law (the peculiar law applicable only to soldiers) and martial law (the so-called law which may in time of necessity make civilians subject to arrest and trial by military tribunals).

The terms "martial law" and "court-martial" originally came from the jurisdiction of the King's Marshall, the leader of the royal forces. Professor Maitland says, in his *Constitutional History of England*, p. 266:

Now, as leaders of the army the constable and marshall seem to have had jurisdiction over offences committed in the army, especially when the army was in foreign parts, and in the fourteenth century we hear complaints of their attempting to enlarge their jurisdiction. Now, as a matter of etymology, *marshall* has nothing whatever to do with *martial*—the marshall is the master of the horse—he is *marescallus*, *mareschalk*, a stable servant—while of course *martial* has to do with Mars, the god of war. Still, when first we hear of martial law in England, it is spelt indifferently *marshall* and *martial*, and it is quite clear that the two words were confused in the popular mind—the law administered by the constable and marshall was martial law.

Thus Coke, in 4th Institutes, c. 17, p. 123, in describing the Court of the Marshall, says "and this court is the fountain of the marshall law." (See also

opinion of Attorney General Cushing, 8 Ops. A. G. 365, 366; Houldsworth, *Martial Law Historically Considered*, 18 *Law Quarterly Review* 117, 118.)

This Court of the King's Marshall functioned before the days of standing armies and when war was fought by feudal levies. Its jurisdiction was vague and undefined, including the punishment of purely military offenses defined by primitive articles of war, as well as the exercise of despotic power over rebels and their sympathizers. Mr. Houldsworth says, *ubi sup.* p. 119:

The army for which the Constable and Marshal's Court was designed was a feudal army. It was called into existence as occasion required. It was not, as in modern times, an army of professional soldiers backed up by an adequate police. We can hardly, therefore, expect to find the modern distinction between a jurisdiction over an army and a jurisdiction over the ordinary citizen in time of rebellion. Ordinary citizens were the soldiers of the Crown, and many of the wars we should now call rebellions. Changes in political manners and military organization will, as we shall see, account for much of the obscurity in which the subject of martial law has been enveloped in modern times.

Standing armies did not come into existence till the time of Charles I, and more particularly the time of Cromwell, Charles II, and James II, and the necessary government of them by military law was confused with the arbitrary powers of the Court Marshall. The solution was not found till the passage

of the mutiny act in 1689, wherein control of the army was transferred to the people's representatives, and military law was confined to soldiers. Since then there has never been a question of the validity of military law, and the only endeavor has been to extend and strengthen its provisions. As Mr. Clode says (*Military and Martial Law*, p. 3) of the English act of 1872:

\* \* \* So far from being either framed without experience or unsanctioned by authority, the code is one which, in its main characteristics, has governed the army for centuries, has been administered by experienced generals, repeatedly sanctioned by the deliberate judgment of Parliament, and often upheld after argument by the constitutional tribunals of the country.

Nevertheless, the confusion between military and martial law arising from their common source still persists and is manifest in the argument on behalf of appellants.

(2) The second cause is connected somewhat with the first and has already been touched on, viz, the struggle between the people and their representatives on the one side and the executive (or Crown) on the other as to the control of the army.

The Stuarts issued several commissions for the trial of all sorts of persons by military law and military commanders. Such acts necessarily caused the greatest apprehensions among the people. Some of these commissions were condemned in the Petition of

Right (1628), and others were afterwards declared illegal. (See Clode, *ubi sup.* 20-25.) When, however, control over the army was assumed by Parliament, and its government was provided for in Statutory Articles of War, the reason for objection to military law arising out of its use by the Crown vanished (though remnants of it still appear in the preamble to the mutiny acts), and the objection never had any force in this country where the control of the Army and Navy is by the Constitution vested in the representatives of the people in Congress.

In spite of the deep-seated confusion between military law and martial law resulting from the two causes referred to above, the entire difference between the two has been noted by all persons who have had occasion to consider the matter. Chancellor Kent said (*Commentaries*, vol. 1, p. 341, note a):

*Military* law is a system of regulations for the government of the armies in the service of the United States, authorized by the act of Congress of April 10th, 1806, and known as the *articles of war*. And *naval* law is a similar system for the government of the Navy, under the act of Congress of April 23d, 1800. But *martial* law is quite a different thing and is founded on paramount necessity and proclaimed by a military chief.

Attorney General Cushing said, in 6 Ops. A. G. 366:

*Military* law, it is now perfectly understood in England, is a branch of the law of the land, applicable only to certain acts of a particular class of persons and administered by special

tribunals, but neither in that nor in any other respect essentially differing, as to foundation in constitutional reason, from admiralty, ecclesiastical, or, indeed, chancery and common law.

It is not the "absence of law" supposed by Sir Matthew Hale, nor is it under any circumstances the "martial law" imagined by Lord Loughborough. It is the system of rules for the government of the army and navy established by successive acts of Parliament.

The Supreme Court of Illinois in *Johnson v. Jones* (44 Ill. 142, 153), used even stronger language:

As the phrases "martial law" and "military law" are sometimes carelessly used as meaning the same thing, it is proper to point out the broad distinction between them. The Constitution authorizes Congress to raise and support armies and to make rules for the government thereof. Acting under this authority, Congress has passed divers acts prescribing the rules and articles of war and providing for the government and discipline of the troops. These rules constitute the military law and are directly sanctioned by the Constitution, but they apply only to persons in the military or naval service of the Government.

What is called martial law, however, has a far wider scope and application. When once established it is made to apply alike to citizen and soldier. To call this system by the name of law seems something of a misnomer. It is not law in any proper sense, but merely the

will of the military commander, to be exercised by him only on his responsibility to his Government or superior officer.

To the same effect is Sir James Stephen in *History of Criminal Law*, vol. 1, p. 208; Sir F. Pollock, *What is Martial Law*, 18 Law Quarterly Rev. 153; Dicey, *Law of the Constitution*, 8th ed., chaps. VIII, IX, App. note x, p. 538. Finally, in *Ex parte Milligan*, 4 Wall. 2, 123 (a case greatly relied on by plaintiffs in error), the court said:

The discipline necessary to the efficiency of the Army and Navy, required other and swifter modes of trial than are furnished by the common-law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and while thus serving, surrenders his right to be tried by the civil courts. All other persons citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury.

We emphasize the distinction between military and martial law because, in our judgment, the importance of the condition that the civil courts shall or shall not be open arose entirely from that portion of the jurisdiction claimed by the Crown and by the Court of

the Marshall which had to do with *martial law*. When the question was one of the subjection of civilians to arrest, detention, and trial by military commissions or by court-marshall (to use the old term), it was of vital importance whether these proceedings could or could not safely and freely be taken and had before the civil courts administering the law of the land. If they could be, certainly it would be contrary to all those principles embodied in the Bills of Rights to oust them from their jurisdiction. When, however, it was a question of subjecting a soldier to the military code and to military courts, these considerations would be without any weight whatsoever. No one can accuse Mr. Justice Brewer of lack of sensitiveness to individual rights, yet in *In re Grimley* (137 U. S. 147, 152, 153), in delivering the opinion of the court, he said:

By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He can not of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status. \* \* \* While our Regular Army is small compared with those of European nations, yet its vigor and efficiency are equally

important. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other. So, unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed.

As the soldier has without question no right to appeal to the civil courts nor to their judgment as to his rights and duties, in many respects most important to him, it can make no difference in his case whether the said courts are open or not; and as to civilians whom he may have injured, their rights are secured by the provision in the Articles of War for surrender of such soldier to the civil authorities on their demand.

This consideration of the lack of importance and materiality to the soldiers, subject to military law, of the availability or nonavailability of the civil courts reflects upon the meaning of the phrase "in time of peace" in article 92, *supra*. If the soldier is at all times and places subject as a general thing to military law (see opening paragraph of the Articles of War, act of August 29, 1916, c. 418, sec. 3, 39 Stat. 650, Comp. Stats. 2308a), it seems necessarily to follow that the words "in time of war" or "in time of peace" as

applied to him can only refer to the general period of war or peace. The main, controlling purpose of the Articles of War is to secure an army as disciplined and efficient as possible for use "in time of war." The fundamental distinction, in so far as this use of the army is concerned, is between the period of time when the sovereign is at peace and the period when it is at war. The existence of this fact, as a general state of affairs, irrespective of limitation in space, is the important matter. The particular place where portions of the army may happen to be stationed is immaterial. Therefore, if article 92, *supra*, be construed with a mind to the main purpose of the Articles of War as a whole, there can be no doubt (we submit) that the phrase therein, "in time of peace," must be construed to mean the absence, generally, of a state of war to which the United States is a party.

It is true that in the case of *Caldwell v. Parker* 252 U. S. 376, this court, speaking through the Chief Justice, expressed a doubt whether the phrase "in time of war" in section 30 of the act of March 3, 1863, c. 75, and in article 59 of the Articles of War of 1874, and in article 74 of the Articles of War of 1916 did more—

than to recognize the right of the military authorities, in time of war, within the areas affected by military operations, or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified—a doubt which, if solved against the assump-

tion of general military power, would demonstrate not only the jurisdiction of the State courts in this case, but the entire absence of jurisdiction in the military tribunals. And this doubt becomes additionally serious when the revision of 1874 is considered, since in that revision the act of 1863 was in terms reenacted and the words "except in time of war," appearing for the first time in article 59 of that revision, could have been alone intended to qualify the time of war with which the act dealt; that is, a condition resulting from a state of war which prevented or interfered with the discharge of their duties by the civil courts.

It was expressly stated, however, that the court did not feel called upon to enter into an investigation of the point, and we therefore assume that the question is still open for argument, as though the remarks quoted above had not been made. If that be so, we respectfully submit the argument made above as a reason why the doubt expressed by the court in *Caldwell v. Parker* should be resolved in favor of a broad construction of the phrase in question. In addition we most respectfully call attention to what appears to be a misapprehension on the part of the court as to the meaning of the two authorities referred to in the opinion. It is said that Colonel Winthrop observes (*Military Law*, 2d ed., p. 1033) that section 30 of the act of March 3, 1863, c. 75, "was intended to provide" for a condition where the courts of the State were not open. What

Colonel Winthrop says of section 30 at the place cited is that "its *main object* evidently was" to provide for such a condition. He does not intimate an opinion that the section was limited to this condition.

Again the court says in *Caldwell v. Parker* that it was doubtless this purpose indicated by Winthrop—

which caused the court in the *Coleman case* to say that that statute had no application to territory 'where the civil courts were open and in the undisturbed exercise of their jurisdiction' (p. 515).

The whole passage from which the above quotation from the *Coleman case* is taken reads as follows (97 U. S. 515):

In denying to the military tribunals exclusive jurisdiction, under the section in question, over the offences mentioned, when committed by persons in the military service of the United States and subject to the Articles of War, we have reference to them when they were held in States occupying, as members of the Union, their normal and constitutional relations to the Federal Government, in which the supremacy of that Government was recognized, and *the civil courts were open and in the undisturbed exercise of their jurisdiction*. When the armies of the United States were in the territory of insurgent States, banded together in hostility to the National Government and making war against it, in other words, when the armies of the United States were in the enemy's country,

the military tribunals mentioned had, under the laws of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offences committed by them. They were answerable only to their own Government, and only by its laws, as enforced by its armies, could they be punished. (Italics ours.)

When this passage is read as a whole, it clearly appears that the court in the *Coleman case* expressed an opinion precisely the contrary to that attributed to it in *Caldwell v. Parker*. It stated that the military tribunals *had* jurisdiction (concurrently, it is true, with the courts of the States) over, e. g., murder, at times when the civil courts were open; but that where the said courts were not open the military tribunals had exclusive jurisdiction over such offenses.

(b) It is claimed by counsel for plaintiffs in error that if the construction of article 92 contended for by us be adopted, the statute would be unconstitutional. To so hold, however, would be to go contrary to the numerous authorities which, from the time of the Constitution (and before) have sustained the jurisdiction of military and naval tribunals over soldiers and sailors. Many cases have dealt with and sustained jurisdiction over offenses which could likewise have been dealt with by the civil courts, e. g., *Ex parte Reed*, 100 U. S. 13 (embezzlement); *Ex*

*parte Mason*, 105 U. S. 696 (assault with intent to kill); *Smith v. Whitney*, 116 U. S. 167 (embezzlement); *Johnson v. Sayre*, 158 U. S. 109 (embezzlement); *Swaim v. United States*, 165 U. S. 553 (fraud); *Carter v. McClaughry*, 183 U. S. 365 (fraud and embezzlement); *Grafton v. United States*, 206 U. S. 333 (homicide); *Franklin v. United States*, 216 U. S. 559, 566, 567 (embezzlement and fraud). See also *United States v. Clark*, 31 Fed. 710 (homicide); *Re Stubbs*, 133 Fed. 1012 (homicide); *United States v. Hirsch*, 254 Fed. 109 (conspiracy to defraud).

It makes no difference (we submit) whether, in the above cases, the offense was charged as a violation of the general article (in the act of August 29, 1916, c. 418, article 96) punishing all crimes and offenses not capital of which persons subject to military law may be guilty, or not. When the question is as to the power of Congress under the Constitution, the power must be limited, on the one hand, to such offenses as have a legitimate bearing on the government of the Army; but, on the other hand, within such limitation, Congress has the choice as to how far it shall go. Therefore, Congress may punish, e. g., murder and rape committed by persons in the military or naval service, either under those names, as in article 92, *supra*, or as acts prejudicial to discipline. No one can dispute that, by whatever name the offense is called, the offenses themselves are prejudicial to the discipline and efficiency of the Army and Navy and therefore subject to punish-

ment by military law under the broad powers granted to Congress. (See *McKinley v. United States*, 249 U. S. 397.) That this is so is clearly shown by the opinion of the court in *Ex parte Meeson* (105 U. S. 696, 699, 700), where the punishment fixed by the State law for the offense is adopted as the measure of the punishment for the court-martial whose jurisdiction and constitutional power the court sustained.

In *1st Commentaries* (p. 341, note a), Chancellor Kent said:

It is not a question susceptible of doubt, that Congress may, under the Constitution, confer upon courts-martial in the Army and Navy the trial and punishment of crimes, capital and otherwise, for they are authorized "to make rules for the government and regulation of the land naval forces"; and cases "arising in the land and naval forces" are excepted from the provision, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

In *Coleman v. Tennessee* (97 U. S. 509, 514), Mr. Justice Field, delivering the opinion of the court, said:

We do not mean to intimate that it was not within the competency of Congress to confer exclusive jurisdiction upon military courts over offences committed by persons in the military service of the United States. As Congress is expressly authorized by the Constitution "to raise and support armies" and

"to make rules for the government and regulation of the land and naval forces," its control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offences committed by persons in the military service, would seem to be plenary.

These reasons apply *a fortiori* to the case of the murder of one military prisoner by another within the confines of the prison. In such cases article 74 of the Articles of War (act of August 29, 1916, c. 418, § 3), expressly forbids the surrender of the offender to the civil authorities. The matter is one of the internal discipline of a military prison, and therefore clearly within the constitutional powers of Congress.

#### THE PRIOR SENTENCES.

We think we should also call the attention of the court to the lack of any allegation in the petition for *habens corpus* that the prior sentences imposed upon appellants had expired at the time the petition was presented. If they had not, it may be that the application was premature, and the case really a moot one.

#### CONCLUSION.

We respectfully submit that the judgment of the District Court denying the writ should be affirmed.

WILLIAM L. FRIERSON,  
*Solicitor General.*

W. C. HERRON, *Attorney.*

DECEMBER, 1920.

# SUPREME COURT OF THE UNITED STATES.

No. 421.—OCTOBER TERM, 1920.

Alexander Kaha et al., Appellants,  
vs.  
August V. Anderson, Warden of the  
United States Penitentiary at  
Leavenworth, Kansas.

Appeal from the District  
Court of the United States  
for the District of Kansas.

[January 31, 1921.]

Mr. Chief Justice WHITE delivered the opinion of the Court.

The petition for *habeas corpus* filed by the appellants on June 11, 1920, to obtain their release from confinement in the United States Disciplinary Barracks at Leavenworth having, on motion of the United States, been dismissed on the face of the petition and documents annexed, the appeal which is now before us was prosecuted. We are therefore only concerned with the issues which legitimately arise from that situation.

It was charged in the petition that on November 4, 1918, the petitioners were placed on trial before a general court-martial for violation of the 96th Article of War, in having conspired to murder a named fellow prisoner, and of the 92d Article in having committed the murder, and that at the time of the alleged commission of the crimes stated they were undergoing imprisonment in the barracks in question under sentences which had been imposed upon them by courts-martial for military offenses. It was averred that the legality of the organization of the court and its jurisdiction was at once challenged, and on the challenge being overruled, each of the petitioners was, on November 25, 1918, found guilty of the murder charged, and as the result of the action of the President in mitigating and approving the sentences, they were each liable for a long term of imprisonment.

The release which was prayed was based upon the following grounds: (1) Alleged illegality in the constitution of the court; (2) an assertion that the petitioners did not possess the military

status essential to cause them to be subject to the court's jurisdiction; (3) that their subjection, even if they possessed such military status, to be tried by court-martial, deprived them of asserted constitutional rights, and (4) that in no event had the court-martial power to try them for murder under the conditions existing at the time of the trial. We come to consider whether the court erred in overruling these contentions.

The 5th Article of War exacts that in any event a court-martial shall be composed of not less than five officers and must be composed of thirteen when that number can be convened without manifest injury to the service. The court in this case was composed of eight members, the order certifying that more than that number could not be convened without manifest injury to the service. The argument is that because the court was composed of less than thirteen officers it was unlawfully constituted. But it has long been settled that the exercise of discretion as to fixing the number of the court with reference to the condition of the service, within the minimum and maximum limits, is executive and not subject to judicial review. *Martin v. Mott*, 12 Wheat. 19, 34, 35; *Bishop v. United States*, 197 U. S. 334, 340. The objection is therefore without merit.

Of the eight members of the court two were described in the order as retired officers and three as officers of the United States Guards. The contention is that, as by the 4th Article of War one must be an officer in the military service of the United States to be competent to sit on a court-martial, and as retired officers and officers of the United States Guards are not within that requirement, the constitution of the court was void. But both contentions, we are of opinion, are untenable; as to the retired officers, because it is not open to question, in view of the ruling in *United States v. Tyler*, 105 U. S. 244, that such officers are officers in the military service of the United States, and because it is equally certain that the order assigning the retired officers to the court was within the authority conferred by the Act of April 23, 1904, c. 1465, 33 Stat. 264, which provides that: "The Secretary of War may assign retired officers of the Army, with their consent, to active duty . . . upon courts-martial . . ." As to the United States Guards officers, there can also be no doubt that the President was fully empowered by Section 2 of the Selective Ser-

vise Act of May 18, 1917, c. 15, 40 Stat. 77, to exert the power which he did by Special Regulations, No. 101, organizing the military force known as the United States Guards, and that such forces, under the express terms of Section 1 of the same act, were a part of the Army of the United States, and that these officers were therefore competent to be assigned to court-martial duty.

As we have seen, the pleadings disclose that the alleged crimes were charged to have been committed by the accused while they were confined in a United States military prison undergoing punishment inflicted upon them, and upon this it is contended that either by implications resulting from the length of the sentences previously imposed and which were being suffered, or by assumption that there was a provision in the sentences to that effect, it resulted that the accused, by the convictions and sentences, ceased to be soldiers and were no longer subject to military law. But as the allegations of the petition and the contention based upon them concede that the petitioners were, at the time of the trial and sentence complained of, military prisoners undergoing punishment for previous sentences, we are of opinion that even if their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since as they remained military prisoners they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment. Thus, in dealing with that question, in *Carter v. McClaughry*, 183 U. S. 365, 383, it was said:

"The accused was proceeded against as an officer of the Army and jurisdiction attached in respect of him as such, which included not only the power to hear and determine the case but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.

"He was a military prisoner though he had ceased to be a soldier, and for offenses committed during his confinement he was liable to trial and punishment by court-martial under the rules and articles of war. (Rev. Stat., sec. 1361)." See in addition, Act of March 3, 1915, c. 143, 38 Stat. 1084; 2d Article of War, par. "e"; 16 Op. At. Gen. 292; *In re Craig*, 70 Fed. 909; *Ex parte Wildman*, Fed. Cas. 17,653a.

And as the authorities just referred to and the principles upon which they rest adequately demonstrate the unsubstantial char-

acter of the contention, that to give effect to the power thus long established and recognized would be repugnant to the 5th Amendment, we deem it unnecessary to notice the question further.

In connection with this subject we observe that a further contention, that conceding the accused to have been subject to military law, they could not be tried by a military court because Congress was without power to so provide consistently with the guarantees as to jury trial and presentment or indictment by grand jury, respectively secured by Art. 1, sec. 8, of the Constitution, and Art. 5, of the Amendments, is also without foundation, since it directly denies the existence of a power in Congress exerted from the beginning, and disregards the numerous decisions of this court by which its exercise has been sustained,—a situation which was so obvious more than forty years ago as to lead the court to say in *Ex parte Reed*, 100 U. S. 13, 21:

"The constitutionality of the acts of Congress touching the army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer open to question in this court. Const., art. 1, sect. 8, and amendment 5. In *Dynes v. Hoover* (20 How. 65), the subject was fully considered and their validity affirmed."

This brings us to the final contention, that because when the trial occurred it was time of peace no jurisdiction existed to try for murder, as Article 92 provided that ". . . no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." That complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities, is not disputable. *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146. It is therefore difficult to appreciate the reasoning upon which it is insisted that although the Government of the United States was officially at war, nevertheless so far as the regulation and control by it of its army is concerned, it was at peace. Nor is it any less difficult to understand why reliance to sustain that proposition is placed on *Caldwell v. Parker*, 252 U. S. 376, since that case involved no question of the want of jurisdiction of a court-martial over a crime committed by a soldier, but solely whether the jurisdiction which it was conceded such a court possessed was intended to be exclusive of a concurrent power in the state court to punish the same act, as the mere result of a declara-

tion of war and without reference to any interruption, by a condition of war, of the power of the civil courts to perform their duty; and moreover in that case the question here raised was expressly reserved from decision.

Coming now to consider that question in the light (1) of the rulings in *Ex parte Milligan*, 4 Wall. 2; *Coleman v. Tennessee*, 97 U. S. 509; *Ex parte Mason*, 105 U. S. 696 and *Caldwell v. Parker*, 252 U. S. 376; (2) of the differences between the articles of 1874 and those of 1916 showing a purpose to rearrange the jurisdiction of courts-martial; (3) of the omission of the qualification, "except in time of war," from the clauses of the latter articles conferring jurisdiction as to designated offenses, including those capital (Articles 92 and 93), and its retention in the article dealing with the duty of the military to deliver to the state authorities (Article 74), and (4) of the placing in a separate article (Article 92) of the provision conferring jurisdiction as to murder and rape and qualifying that jurisdiction by the words, "in time of peace," not used in the previous articles, we are of opinion that that qualification signifies peace in the complete sense, officially declared. The fact that the articles of 1916 in other respects make manifest the legislative purpose to give effect to the previous articles as interpreted by the decided cases to which we have referred, at once convincingly suggests that a like reason controlled in adopting the limitation, "except in time of peace," contained in Article 92. See *McErath v. United States*, 102 U. S. 426, 438, where it was expressly decided that the limitation, "except in time of peace," on the power of the President to summarily dismiss a military officer, contemplated not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed. Indeed, in that case it was pointed out that this significance of the words had received the sanction of Congress and had been made the basis for the adjustment of controversies depending upon the time when peace was established.

*Affirmed.*

A true copy.

Test:

*Clerk Supreme Court, U. S.*